Contracters is reſtrained by ſome violence, are alſo null [x].

[x] Si de alia re ſtipulator ſenſerit, de alia promiſſor, nulla contrahitur obligatio. §. 22. *inſt de inut. ſtip.*

In omnibus negotiis contrahendis, ſive bona fide ſint, ſive non ſint: ſi error aliquis intervenit, ut aliud ſentiat puta qui emit, aut qui conducit, aliud qui cum his contrahit, nihil valet quod acti ſit. *l.* 57. *ff. de obl. & act.* Non videntur, qui errant, conſentire. *l.* 116. §. 2. *ff. de reg. jur. v. l.* 137. §. 1. *ff. de verb. obl.* Si Stichum ſtipulatus, de alio ſentiam, tu de alio, nihil actum erit. *l.* 83. §. 1. *ff. de verb. obl.* Cùm in corpore diſſentiatur, apparet nullam eſſe emptionem. *l.* 9. *ff. de contr. empt.*

Si pater tuus, per vim coactus, domum vendidit, ratum non habebitur quod non bona fide geſtum eſt: malæ fidei enim emptio irrita eſt. *l.* 1. *C. de reſc. vend.* Nihil conſenſui tam contrarium eſt, qui & bonæ fidei judicia ſuſtinet, quàm vis atque metus. *d. l.* 116. *ff. de jur. reg.* See the Title of the vices of Covenants.

XI.

11. *Covenants about things which cannot be bought or ſold, are null.*

Covenants in which people treat about things which cannot be bought or ſold, ſuch as Things ſet apart to a Holy Uſe, Things belonging to the Publick, are null [y].

[y] Sacram vel religioſam rem, vel uſibus publicis in perpetuum relictam, ut forum, aut Baſilicam, aut hominem liberum inutiliter ſtipulor: quamvis ſacra, profana fieri, & uſibus publicis relicta, in privatos uſus reverti, & ex libero ſervus fieri poteſt. *l.* 83. §. 5. *ff. de verb obl.* §. 2. *inſt. de inut. ſtip.*

XII.

11. *A Covenant annulled by the change of the thing ſold.*

If in a Covenant the one party is bound to give a thing to the other, and before it be delivered the thing ceaſes to be a vendible Commodity, without the deed of the perſon who was bound to deliver it, the Covenant will be annulled. Thus, the Sale of an Eſtate will be without effect, and will become null, if the Eſtate is deſtinated for ſome publick Work, without the act of the Seller [z].

[z] Item contrà, licet initio utiliter res in ſtipulatum deducta ſit: ſi tamen poſtea in aliquam eorum cauſam, de quibus ſuprà dictum eſt, ſine facto promiſſoris devenerit, extinguitur ſtipulatio. §. 2. *inſt. de inut. ſtip. l.* 83. §. 5. *de verb obl.*

XIII.

13. *Obligations without a cauſe are null.*

In Covenants wherein any one is obliged without a cauſe, the Obligation is null [a]. And it is the ſame thing, if the cauſe happens to ceaſe [b]. But it is by the circumſtances, that we muſt judge whether the Obligation hath its Cauſe, or not.

[a] *See the fifth Article of the firſt Section.*

[b] Nihil refert, utrumne ab initio ſine cauſa quid datum ſit, an cauſa propter quam datum ſit, ſecuta non ſit. *l.* 4. *ff. de condit. ſine cauſ.*

XIV.

14. *The effect of Covenants that are null thro' the fault of one of the Contracters.*

The Covenants which happen to be null thro' ſome cauſe for which one of the Contracters ought to be reſponſible, as if he has alienated a thing ſet apart to a Holy Uſe, or which belongs to the Publick, altho' they are null, yet they have this effect, to oblige the party who is in fault, to make good the damages which he has occaſioned to the other [c].

[c] Loca ſacra, vel religioſa, item publica, veluti forum, Baſilicam, fruſtra quis ſciens emit. Quæ tamen ſi pro profanis, vel privatis deceptus à venditore quis emerit, habebit actionem ex empto, quod non habere ei licear. Ut conſequatur quod ſua intereſt, eum deceptum non eſſe. §. *ult. inſt. De emptione & venditione. v. l.* 3. *C. de reb. alien. non alien.*

XV.

15. *The conſequences of Covenants annulled.*

If a Covenant, altho' null, has had ſome conſequence, or ſome effect, and is declared to be void; the Contracters are reſtored to the condition which they would have been in if there had been no Covenant at all, in ſo far as the circumſtances will allow, and with the reſtitutions that may be due from him who is liable to make them [d].

[d] Deceptis, ſine culpa ſua, maximè ſi fraus ab adverſario intervenerit, ſuccurri oportebit: cùm etiam de dolo malo actio competere ſoleat. Et boni prætoris eſt, potiùs reſtituere litem, ut & ratio, & æquitas poſtulabit. *l.* 7. §. 1. *ff. de in int. reſtit.*

XVI.

16. *The Miniſtry of Juſtice for annulling Covenants.*

Altho' a Covenant proves to be null, yet he who complains of it, cannot reſtore himſelf to his own right, unleſs the other party conſent to it. But he muſt have recourſe to the Authority of Juſtice, whether it be to get the nullity declared by a Sentence, and himſelf reinſtated in his Right; or to get the Sentence of the Court put in execution, in caſe it ſhould meet with oppoſition [e]. For when it is neceſſary to make uſe of Force, the Publick Juſtice of a Country ſuffers none but what ſhe her ſelf imploys.

[e] Extat enim decretum Divi Marci in hæc verba. Optimum eſt, ut ſi quas putas te habere petitiones, actionibus experiaris. Cùm Marcianus diceret, vim nullam feci. Cæſar dixit, tu vim putas eſſe ſolùm, ſi homines vulnerentur; vis eſt tunc, quoties quis id, quod deberi ſibi putat, non per judicem repoſcit. Quiſquis igitur probatus mihi fuerit, rem ullam debitoris, vel pecuniam debitam, non ab ipſo ſibi ſponte datam, ſine ullo judice temerè poſſidere,

dere, vel accepiſſe, iſque ſibi jus in eam rem dixſe, jus crediti non habebit. *l.* 13. *ff. quod met. cauſ.* Si pater tuus per vim coactus, domum vendidit, ratum non habebitur, quod non bona fide geſtum eſt: malæ fidei enim emptio irrita eſt. Adius itaque nomine tuo, Præſes Provinciæ, autoritatem ſuam interponet. *l.* 1. *C. de reſc. vend. V.* 9. *C. ſol. mat. V. l.* 1. *ff. uti poſſid.* See the fourteenth Article of the following Section, and the ſecond Section of the Vices of Covenants.

XVII.

17. *Covenants which are null, are uſeleſs to third perſons, as well as to the contracters themſelves.*

If the Covenants by which any right accrues to third perſons, prove to be null, they have no more effect, with reſpect to thoſe perſons, than with reſpect to the Contracters. Thus, the Creditor has no Mortgage on the Eſtate which his Debtor had acquired by a Contract that was null[f].

[f] *This Rule is a conſequence, and a natural and neceſſary effect of the Nullity.*

SECT. VI.

Of the diſſolution of Covenants which were not null.

The CONTENTS.

1. *Difference between Covenants that are null, and thoſe that are diſſolved.*
2. *Divers caſes which diſſolve Covenants.*
3. *The latter Covenants derogate from the firſt.*
4. *New Covenants cannot prejudice the Rights which third perſons have acquired by former Covenants.*
5. *A Covenant diſſolved by the event of a Condition.*
6. *Effect of Clauſes of Nullity.*
7. *Covenants annulled by agreement.*
8. *Covenants repealed becauſe of fraud.*
9. *Damage without fraud, which is called* dolus re ipſâ.
10. *Events which diſſolve Covenants.*
11. *Covenants diſſolved for Non-performance.*
12. *The effects and Conſequences of the Diſſolution of Covenants.*
13. *The acceſſory Covenants are diſſolved with the principal.*
14. *The Authority of Juſtice in diſſolving Covenants, and executing what is decreed.*

I.

1. *Difference between Covenants that are null, and thoſe that are diſſolved.*

THere is this difference between the nullity and diſſolution of Covenants; that the nullity makes it never to have been a real Covenant; but only the appearance of one[a]; whereas the diſſolution annuls a Covenant which was in force[b].

[a] Protinus inutilis §. 2. *inſt. de inut. ſtip.* Nec ſtatim ab initio talis ſtipulatio valebit. *d.* §.

[b] Si placita obſervata non eſſent, donatio reſolvetur. *l.* 2. *C. de cond. ob cauſ. dat.*

II.

2. *Divers caſes which diſſolve Covenants.*

Covenants which were valid, may be diſſolved, either by conſent of the parties who change their minds[c]; or by the effect of ſome Paction, which has been added to the Covenant it ſelf, ſuch as a Power of Redemption[d], a Clauſe of Nullity[e]; or by the event of a Condition[f]; or by a Reſtitution[g]; or by a Reſciſſion of the Contract, on account of ſome Fraud, or other Damage, ſuch as the lowneſs of the Price in a Sale, or for other Cauſes, as will appear in the following Articles.

[c] Contrario conſenſu. *l.* 35. *ff. de reg. jur.* Contraria voluntate. §. *ult. inſt. quib. mod. toll. obl.*

[d] *V. l.* 2. *C. de pact. int. empt. & vend. c. l.* 7. *eod.*

[e] *See the fifteenth Article of the third Section; and the eighteenth Article of the fourth Section.*

[f] Sub conditione reſolvitur. *l.* 2. *ff. de in diem add.*

[g] *Tit. de in int. reſt.*

[h] *Tit. de dolo. l.* 2. *C. de reſc. vend.*

III.

3. *The latter Covenants derogate from the firſt.*

The latter Covenants which annul the former, or which change them, or derogate from them, have the effect which the Contracters intend they ſhould have; whether it be to annul, or to alter what they had agreed upon. And they put the Contracters in the condition in which they have a mind to put themſelves by theſe changes, in ſo far as the circumſtances will allow[i].

[i] Pacta noviſſima, ſervari oportere, tam juris, quàm ipſius rei æquitas poſtulat. *l.* 12. *C. de pact.*

IV.

4. *New Covenants cannot prejudice the Rights which third perſons have acquired by former Covenants.*

The changes which the Contracters make to their former Covenants by thoſe of a later date, are no ways prejudicial to the Rights which third perſons had acquired by the firſt Covenants. Thus, a Sale which was already perfected, and executed in all its parts, being diſſolved only by the bare will of the Seller and Buyer; the Buyer's creditor retains his Right of Mortgage on the Eſtate, which returns to the Seller, by the bare voluntary diſſolution of the Contract of Sale[k]. But if the Covenant was diſſolved by the effect of a Clauſe in the Contract,

tract, ſuch as the event of a Condition, or a Power of Redemption in a Sale; this Mortgage would vaniſh, and the Contracters would enter again to their Rights, even by the effect of their Covenant.

[l] Actio quæſita non intercidit. *l.* 63. *ff. de jur. dot.* Non debet alterius colluſione aut inertia alterius jus corrumpi. *l.* 9. *ff. de lib. cauſ.* Non debet alii nocere, quod inter alios actum eſt. *l.* 10. *ff. de jure jur.* See the fourteenth and fifteenth Articles of the twelfth Section of the Contract of Sale; and the remarks made thereon.

V.

5. A Covenant diſſolved by the event of a Condition.

Covenants which are accompliſhed, but upon condition that if ſuch a caſe happens, they ſhall be void; continue in force till the condition happens, and then they are diſſolved, purſuant to the fourteenth and fifteenth Articles of the fourth Section [m].

[m] *See the fourteenth and fifteenth Articles of the fourth Section, and the fourteenth Article of this.*

VI.

6. Effect of Clauſes of Nullity.

If it is ſaid in a Covenant, that it ſhall be void, in caſe one of the Contracters fails to perform ſome engagement; the non-performance does not diſſolve and annul the Covenant, but in conformity to the Rules explained in the eighteenth and nineteenth Articles of the fourth Section [n].

[n] *See the eighteenth and nineteenth Articles of the fourth Section, and the fourteenth Article of this.*

VII.

7. Covenants annulled by agreement.

If a Covenant leaves a liberty to one of the Contracters to recede from his bargain within a certain time, or if there is a Power of Redemption, or other Clauſes which may annul the Covenant ſome other way; the putting theſe Clauſes in execution, diſſolves and annuls the Covenant, according to the agreement of the Contracters [o].

[o] Si quid ita venierit, ut niſi placuerit, intra præfinitum tempus, redhibeatur, ea conventio rata habetur. *l.* 31. §. 22. *ff. de ad. ed. l.* 3. *ff. de contr. empt. l.* 2. §. 5. *ff. pro empt.*

Si fundum parentes tui, ea lege vendiderunt, ut ſive ipſi, ſive hæredes eorum, emptori pretium quandocunque, vel intra certa tempora obtuliſſent, reſtitueretur; teque parato ſatisfacere conditioni dictæ, hæres emptoris non paret, ut contractus fides ſervetur, actio præſcriptis verbis, vel ex vendito tibi dabitur. *l.* 2. *&* 7. *C. de pact. int. empt. & vend. c.* See the ſixteenth Article of the fifth Section, and the laſt Article of this Section.

VIII.

8. Covenants repealed becauſe of fraud.

Covenants in which one of the Contracters is over-reached, and cheated by the fraud of the other, or by any other unfair way, are diſſolved and annulled when the injured party complains of it, and proves the fact [p].

[p] *Toto Tit. de dolo.* See the tenth Article of the foregoing Section, and the third Section of the Vices of Covenants.

IX.

9. Damage without fraud, which is called Dolus reipſâ.

There are ſome Covenants in which the bare damage, altho' without fraud, is ſufficient to annul the Covenant. Thus, for example, the Partition of an Inheritance among Coheirs is annulled by reaſon of too great an inequality [q]; and a Sale, on account of the lowneſs of the Price [r]; or defect of the thing ſold [s]. According to the Rules which ſhall be explained in their proper places.

[q] Majoribus etiam, per fraudem, vel dolum, vel perperam ſine judicio factis diviſionibus, ſolet ſubveniri. *l.* 3. *C. comm. utr. jud.* It is that which we call, *Dolus reipſa.* Si nullus dolus interceſſit ſtipulantis, ſed *ipſa res* in ſe *dolum habet. l.* 36. *ff. de verb. obl.* See the fourth Article of the third Section of the Vices of Covenants.

[r] Rem majoris pretii, ſi tu, vel pater tuus, minoris diſtraxerit, humanum eſt, &c. *l.* 2. *C. de reſc. vend.*

[s] *Tot. tit. de adil. ed.*

X.

10. Events which diſſolve Covenants.

Covenants are ſometimes diſſolved by the bare effect of ſome event. Thus, for inſtance, in the Leaſe of a Houſe, if the Neighbour darkens the Lights of it; if the Landlord does not repair what is ruinous [t]; if the Houſe is to be pulled down for ſome publick Work [u]; the Tenant in all theſe caſes gets the Leaſe to be declared void. Thus a Sale is diſſolved by an Eviction [x]. And it is likewiſe ſo, with reſpect to the Purchaſer, by the Right of Redemption, which belongs to the next lineal Heir, who comes in place of the Purchaſer. And many other events annul differently Covenants, according to the Condition in which they put the things.

[t] Si vicino ædificante, obſcurentur lumina cœnaculi, teneri locatorem inquilino. Certè quin liceat colono, vel inquilino relinquere conductionem, nulla dubitatio eſt. *l.* 25. §. 2. *ff. loc.* Eadem intelligemus, ſi oſtia, feneſtraſve nimium corruptas, locator non reſtituat. *d.* §.

[u] *L.* 9. *l.* 14. *& alias C. de op. publ.*

[x] *V. Toto tit. de evict.*

XI.

11. *Covenants diſſolved for Non-performance.*

The Non-performance of Covenants on the part of one of the Contracters, may give occaſion to their being annulled; whether it be thro' want of ability, or of will, in the party to perform his engagement; altho' there be in the Contract no Clauſe of Nullity. As if the Seller does not deliver the thing ſold. And in theſe caſes, the Covenant is diſſolved, either immediately, if there is ground for it; or after a reaſonable Delay, and with ſuch Damages as the Non-performance may have occaſioned [y].

[y] *This Rule is a conſequence of the preceding Rules.* Si res vendita non tradatur, in id quod intereſt, agitur. *l.* 1. *ff. de act. empt. & vend. l.* 4. *C. eod.* See the following Article, the 14th and 15th Articles of the 5th Section, and the 17th and 18th Articles of the 2d Section of the Contract of Sale.

XII.

12. *The effects and conſequences of the Diſſolution of Covenants.*

In all the Caſes where Covenants are diſſolved, if it is by the will of the Contracters, they are mutually reſtored to the condition in which they have a mind to be by common conſent. And if the Covenant is repealed in a judicial way, the Contracters are put into the condition which ought to follow upon the diſſolution of the Contract; and they are condemned to ſuch Reſtitutions, Damages, and other conſequences as the Covenant ought to have, according to the circumſtances, and with a due regard to the different cauſes of the diſſolution. Which depends on the Prudence of the Judge [z], according to the foregoing Rules, and the others which ſhall be explained under the Title of Reſciſſion of Contracts, and Reſtitution of things to their firſt Eſtate.

[z] Uti quæque res erit, animadvertam. *l.* 1. §. 1. *ff. de min.*

Quod omne, ad judicis cognitionem remittendum eſt. *l.* 135. §. 2. *ff. de verb. obl.*

Cauſa rei reſtituatur. *l.* 20. *ff. de rei vind.* Et fructuum dumtaxat omniſque cauſæ nomine, condemnatio fit. *l.* 68. *eod.*

XIII.

13. *The acceſſory Covenants are diſſolved with the principal.*

The principal Covenants being annulled, thoſe which are conſequences and acceſſories to them, are ſo likewiſe [a].

[a] Pecuniam quam te ob dotem accepiſſe pacto interpoſito [ut fieri, cum jure matrimonium contrahitur, aſſolet] proponis, impediente, quocumque modo juris authoritate matrimonium conſtare, nullam de dote actionem habes: & propterea pecuniam, quam eo nomine accepiſti, jure condictionis reſtituere debes. Et pactum quod ita interpoſitum eſt, perinde ac ſi interpoſitum non eſſet, haberi oportet. *l.* 1. *C. de cond. ob cauſ. dat.*

XIV.

14. *The Authority of Juſtice in diſſolving Covenants, and executing what is decreed.*

When a Covenant is not diſſolved by common conſent, the party who complains, cannot moleſt the other; but he ought to have recourſe to Juſtice, to get the Covenant declared void, and the Sentence of the Judge put in execution [b].

[b] Qui reſtituere juſſus judici non paret, contendens non reſtituere: ſi quidem habeat rem, manu militari officio judicis, ab eo poſſeſſio transfertur. *l.* 68. *ff. de rei vind.* Ingrediendi enim poſſeſſionem rerum dotalium, hæredibus mariti non conſentientibus, ſine autoritate competentis judicis, nullam habes facultatem. *l.* 9. *C. ſol. matr.* See the ſixteenth Article of the fifth Section.

TITLE II.

Of the CONTRACT OF SALE.

Of the Origine, and Uſe of the Contract of Sale.

THE Neceſſity of having the Property of the greateſt part of Things which we ſtand in need of, and eſpecially of thoſe which we cannot uſe without conſuming, or waſting them, and conſequently without being Maſters of them; hath been the Origin of the ways of acquiring Things, and of transferring the Property of them from one Perſon to another.

The firſt Commerce for this Uſe was that of giving one Thing for another. And this way of Traffick is called *Exchange* [a]; in which, to have a Thing which we ſtand in need of, we give another, which is uſeleſs, or leſs neceſſary to us. But becauſe Exchange, or Bartering of Commodities, ſeldom or never ſuits with the circumſtances of all Parties, either becauſe the Contracters have not on both ſides wherewithal to accommodate one another; or becauſe it is troubleſome to make the Eſtimations, and to adjuſt the Things in a due Equality, People have invented the uſe of publick Coin, which, having its value regulated and known, makes the Price of every Thing. And thus, inſtead of two Eſtimations, which it was ſo difficult to make equal, there is no occaſion now to eſtimate any more than one thing on one ſide; and on the other ſide, there is the juſt Price of the thing eſtimated, by the publick Coin. And it is this Commerce of all things for Money,

which we call *Sale*; which is compoſed partly of the natural Uſe of giving one thing for another, and of the Invention of publick Coin, which makes the Value of all things that are capable of being eſtimated.

[a] Origo emendi vendendique, à permutationibus cœpit, olim enim non ita erat nummus. Neque aliud merx, aliud pretium vocabatur; ſed unuſquiſque ſecundum neceſſitatem temporum ac rerum, utſlibus inutilia permutabat. Quando plerumque evenit, ut quod alteri ſupereſt, alteri deſit. Sed quia non ſemper, ne facile concurrebat, ut cùm tu haberes, quod ego deſiderarem, invicem haberem quod tu accipere velles, electa materia eſt, cujus publica, ac perpetua æſtimatio, difficultatibus permutationum, æqualitate quantitatis, ſubveniret. *l.* 1. *ff. de contr. empt.*

SECTION I.

Of the Nature of the Contract of Sale, and in what manner it is perfected.

The CONTENTS.

1. *Definition of Sale.*
2. *The Sale is perfected by the bare conſent.*
3. *How the conſent is given.*
4. *Who may ſell and buy, and what things may be ſold.*
5. *Three ſorts of Engagements in the Contract of Sale.*
6. *The firſt ſort, is of the Engagements that are expreſſed.*
7. *The ſecond ſort, is of the Engagements which ariſe from the Nature of the Contract.*
8. *The third ſort, is of the Engagements regulated by the Laws, Cuſtom, and Uſage of the Country.*

I.

1. *Definition of Sale.*

THE Contract of Sale, is a Covenant by which one gives a thing for a Price in current Money; and the other gives the Price to have the thing [a].

[a] Si pecuniam dem, ut rem accipiam, emptio & venditio eſt. *l.* 5. §. 1. *ff. de præſc. verb.* Sine pretio nulla venditio eſt. *l.* 2. §. 1. *ff. de contr. empt.* Pretium in numerata pecunia conſiſtere debet. §. 2. *inſt. de empt. & vend.* Nec merx utrumque ſed alterum pretium vocatur. *l.* 1. *ff. de contr. empt.*

II.

2. *The Sale is perfected by the bare conſent.*

The Sale is perfected by the bare conſent of the parties, altho' the thing ſold be not as yet delivered, nor the Price paid [b].

[b] *See the eighth Article of the firſt Section of the Title of Covenants.* Conſenſu fiunt obligationes, in emptionibus, venditionibus. *inſt. de obl. ex. conſenſu.* (Emptio) conſenſu peragitur. *l.* 1. *in f. ff. de contr. empt.* Emptio & venditio contrahitur, ſimul atque de pretio convenerit, quamvis nondum pretium numeratum ſit. *inſt. de empt. & vend.*

See the tenth Article of the ſecond Section, concerning the manner in which it is neceſſary to underſtand that the bare conſent perfects the Contract of Sale.

III.

3. *How conſent is given.*

The conſent which makes the Sale, is given either in preſence of the Parties, or in their Abſence; or in Writing, or by Word of Mouth; or under the hand of the Parties, or before a Publick Notary: Purſuant to the Rules explained in the Title of Covenants [c]. And after the Sale is thus perfected, it is not any longer in the Power either of the Seller, or Buyer, to revoke his Conſent; altho' it were immediately after the Contract is ended; unleſs both Parties ſhould agree jointly to diſſolve it [d].

[c] *See Art.* 10, 11, 12, 13, 14, 15, *and* 16, *of the ſecond Section of Covenants.*

[d] Nec enim, licet in continenti facta, pœnitentiæ conteſtatio, conſenſu finita reſcindit. *l.* 13. *C. de contr. empt. See the fourteenth and fifteenth Articles of the twelfth Section.*

IV.

4. *Who may ſell and buy, and what things may be ſold.*

All ſorts of perſons may buy and ſell, unleſs they are under ſome Incapacity, or that the thing ſold is not Vendible, or unleſs there be ſome other Vice in the Sale. According to the Rules which ſhall be explained in the eighth Section [e].

[e] *See the ſecond Article of the ſecond Section of Covenants.*

V.

5. *Three ſorts of Engagements in the Contract of Sale.*

The Contract of Sale, as all other Contracts, forms three ſorts of Engagements. The firſt is of thoſe which are expreſſed in the Contract; the ſecond, of thoſe which are the natural conſequences of the Sale, altho' the Contract makes no mention of them; and the third is of ſuch Engagements as the Laws, Cuſtoms, and Uſage of the Country has eſtabliſhed [f].

[f] *See the firſt Article of the third Section of Covenants.*

Imprimis ſciendum eſt, in hoc judicio id demum deduci quod præſtari convenit. *l.* 11. §. 1. *ff. de act. empt. & empt.* Quòd ſi nihil convenit, tunc ea præſtabuntur, quæ naturaliter inſunt hujus judicii poteſtate. *d.* §. in his contractibus (emptionibus & venditionibus) alter alteri obligatur, de eo quod alterum alteri, ex æquo præſtare oportet. *l.* 2. *in f. ff. de oblig. & act.* §. *ult. inſt. de obl. ex conſ.* Ea enim quæ ſunt moris, & conſuetudinis, in bonæ

bonæ fidei judiciis debent venire. *l.* 31. §. 20. *ff. de ed. ed.* & *l.* 8. & *l.* 19. *C. de locato & cond.* See the first Article of the third Section of Covenants.

VI.

5. The first sort is of the Engagements that are expressed.

The first of these three sorts of Engagements, reaches to all the particular Covenants, and to all the different Pacts, which may be added to the Contract of Sale; such as Conditions, Clauses of Nullity in default of Payment, the Right of Redemption, and others of the like nature, which shall be explained in the sixth Section; And these Covenants make a part of the Contract, and are in the place of Laws[g].

[g] *See the first Article of the fourth Section of Covenants, and the sixth Section of this Title.*

Hoc servabitur quod initio convenit, legem enim contractus dedit. *l.* 23. *ff. de reg. jur.*

Contractus legem ex conventione accipiunt. *l.* 1. §. 6. *ff. dep.*

VII.

7. The second sort is of the Engagements which arise from the nature of the Contract.

The second sort of Engagements, which are the natural consequences of the Contract of Sale, comprehends those under which the Seller may be to the Buyer, and the Buyer to the Seller, altho' the Contract make no mention of them. These Engagements oblige the Parties in the same manner as the Contract itself, of which they are Consequences[h]. And they shall be explained in the two Sections which follow.

[h] De eo quod alterum alteri, ex bono & æquo præstare oportet. *l.* 2. *in f. ff. de oblig. & act.* See the two following Sections.

VIII.

8. The third sort, is of the Engagements regulated by the Laws, Custom, and Usage of the Country.

The third sort of Engagements consists of those which are established by particular Laws, by the Practice and Custom of the Country. Thus, Custom has regulated in the Sale of Horses, the Defects which are sufficient to annul the Sale[i].

[i] Ut mos regionis postulabat. *l.* 8. *C. de locato l.* 19. *eod.*

SECT. II.

Of the Engagements which the Seller is under to the Buyer.

The CONTENTS.

1. *The first Engagement of the Seller, is to deliver the thing sold.*
2. *The second Engagement of the Seller, is to take care of the thing sold till the time of delivery.*
3. *The third Engagement, is that of Warranty.*
4. *The fourth Engagement relates to the Faults of the thing sold.*
5. *The definition of Delivery.*
6. *The Delivery of Moveables.*
7. *Delivery of Immoveables.*
8. *The Clause of precarious Possession tacitly understood.*
9. *Delivery of Things Incorporeal.*
10. *The first effect of the Delivery, is the translation of the full Property.*
11. *Another effect of the Delivery, with respect to him who has bought the thing honestly from one who was not the right Owner; and that is, the right of enjoying it.*
12. *Another effect of the Delivery, the right to prescribe.*
13. *Another effect of the Delivery, between two Buyers of the same thing.*
14. *Of the Time of Delivery.*
15. *Of the Place of Delivery.*
16. *Damages for the delay of Delivery.*
17. *Wherein consist the Damages.*
18. *Consequences of Gain, or Loss, which enter not into the Damages.*
19. *Damages are due, whether the Sale subsists, or not.*
20. *It does not depend on the Seller to annul the Sale by his failing to deliver the thing.*
21. *The Delivery hindered by an accident.*
22. *If the Seller is in hazard of losing the Price, he is not obliged to deliver the Thing.*
23. *The Seller and Buyer both in delay.*
24. *What care the Seller ought to take of the thing sold.*
25. *The care which the Seller is to take, may be regulated by agreement.*
26. *If it is the Buyer's fault that he does not receive the Goods, the Seller is discharged from his Obligation to take care of them.*
27. *The Engagement of the Seller not to sell too dear.*

I.

1. The first Engagement of the Seller, is to deliver the thing sold.

PEOPLE buy things for no other end but to have them in their own power, and to possess them. Thus, the first Engagement which the Seller is under, is to deliver the thing sold, altho' the Contract make no mention of it[a]. And the Rules of this Engagement shall be explained in the fifth Article, and those that follow.

[a] Imprimis ipsum rem præstare venditorem oportet, id est, tradere. *l.* 11. §. 2. *ff. de act. empt. & vend.*

II.

2. *The ſecond Engagement of the Seller, is to take care of the thing ſold till the time of delivery.*

It is a conſequence of this firſt Engagement of the Delivery, and therefore is reckoned as a ſecond Engagement, that until the time of the Delivery the Seller is obliged to keep, and to take care of the thing ſold [b], purſuant to the Rules which ſhall be explained in the twenty-fourth Article, and thoſe that follow.

[b] Antequam (venditor) vacuam poſſeſſionem tradat, cuſtodiam & diligentiam præſtare debet. *l.* 36. *ff. de act. & vend.*

III.

3. *The third Engagement is that of Warranty.*

This is another conſequence of the Delivery, and makes a third Engagement, that the Seller ought to warrant, that is, ſecure the Buyer in the peaceable Poſſeſſion of the thing ſold. And this obliges the Seller to put a ſtop to the Pretenſions of every one that claims, either a Right of Property in the thing ſold, or any other Right which might diſturb the Buyer in the Poſſeſſion and Enjoyment of the thing he has bought. For it is the Right to poſſeſs, and to enjoy, that he has bought [c]. I ſhall explain the Rules of this Engagement in the tenth Section.

[c] Sive tota res evincatur, ſive pars, habet regreſſum emptor in venditorem. *l.* 1. *ff. de evict. v. l.* 60. *& 70. eod.* Habere licere. *l.* 11. §. *ult. ff. de act. empt. & vend.*

[*The Common Law of* England *does not bind a Man to warrant the thing he ſells, unleſs there be an expreſs Warranty, or a Warranty by Law.*]

IV.

4. *The fourth Engagement relates to the Faults of the thing ſold.*

Since people buy things only to imploy them to the uſes for which they are deſtined, this is a fourth Engagement which the Seller is under to the Buyer, to take back the thing ſold, if it has ſuch faults and defects as render it unfit for its uſe, or too troubleſome; or to diminiſh the Price of the thing, whether the defects were known to the Seller, or not [d]. And if he knows them, he is obliged to declare them [e]. The Rules of this Engagement ſhall be explained in the eleventh Section.

[d] Qui pecus morboſum, aut tignum vitioſum vendidit, ſi quidem ignorans fecit: id tantùm exempto actione præſtaturum, quanto minoris eſſem empturus, ſi id ita eſſe ſciſſem. Si verò ſciens reticuit, &c. *l.* 13. *ff. de act. empt. & vend.*

[e] Certiores faciant emptores, quid morbi, vitiive cuique ſit. *l.* 1. §. 1. *ff. de ad. ed.* Eademque omnia, cum ea mancipia venibunt, palàm, rectè pronuntianto. *d.* §.

Of DELIVERY.

V.

Delivery is the transferring of a thing ſold into the power and poſſeſſion of the Buyer [f].

[f] Ratio (vel datio) poſſeſſionis, quæ fieri debeat. *l.* 3. *ff. de act. empt. & vend.* Tradendo transfert. *l.* 20. *ff. de acq. rer. dom.* dendo transfert. *l.* 20. *ff. de acq. rer. d eod.*

VI.

6. *The delivery of Moveables.*

The Delivery of Moveables is made, either by tranſporting them into the power and poſſeſſion of the Buyer [g], or without this tranſportation, by the delivery of the Keys, if the things ſold are kept under Lock and Key [h], or by the bare will of the Seller and Buyer, if the things could not be tranſported [i]; or if the Buyer had already the thing ſold in his cuſtody by another Title, as if it was depoſited into his hands, or if he had borrowed it [l].

[g] Tradendo transfert. *l.* 20. *ff. de acq. rer. dom. l.* 9. §. 3. *eod.*

[h] Si quis merces in horreo depoſitas vendiderit, ſimul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem. §. 45. *inſt. de rer. diviſ. l.* 1. §. 21. *in f. ff. de acq. vel amitt. poſſ. l.* 74. *ff. de contr. empt.*

[i] Non eſt enim corpore & actu neceſſe apprehendere poſſeſſionem, ſed etiam oculis & affectu. Et argumento eſſe eas res quæ propter magnitudinem ponderis moveri non poſſunt, ut columnas: nam pro traditis eas haberi, ſi in re præſenti conſenſerint. *l.* 1. §. 21. *ff. de acq. vel amitt. poſſ.*

[l] Interdum ſine traditione, nuda voluntas domini ſufficit ad rem transferendam. Veluti ſi rem quam commodavi, aut locavi tibi, aut apud te depoſui, vendidero tibi. Licet enim ex ea cauſa tibi eam non tradiderim, eo tamen quòd patior eam ex cauſa emptionis apud te eſſe, tuam efficio. *l.* 9. §. 5. *ff. de acq. rer. dom.* §. 44. *inſt. de rer. diviſ.*

VII.

7. *Delivery of Immoveables.*

The Delivery of Immoveables is made by the Seller, when he quits the Poſſeſſion of the Thing that the Buyer may take it [m]: whether it be by delivering the Deeds and Writings, if there be any [n]; or the Keys, if it is a place ſhut up, ſuch as a Houſe, a Park, a Garden [o]: or by carrying the Buyer upon the place: or only ſhewing him it at a diſtance [p]: or by conſenting that he take poſſeſſion of it [q]: or by the Seller's acknowledging that if he continue to poſſeſs it, it ſhall be only precariouſly; that is, in the ſame manner as he who poſſeſſes a thing belonging to another perſon, on condition to reſtore it to the

Owner,

Owner, whenever he ſhall be pleaſed r it[r]. And if the Seller reſerves lf the Uſe and Profits, this Re- ſhall likewiſe be in the place ry[s].

ndum dari ſtipularetur, vacuam quoque tradi oportere, ſtipulari intelligitur. *de act. empt. & vend.*
num mancipiorum inſtrumentis dona- is, & ipſorum mancipiorum donatio- litionem factam intelligis. *l.* 1. *C. de*
que claves horrei tradiderit emptori, proprietatem mercium ad emptorem. *l.* 9. §. 6. *ff. de acq. rem. dom.*

[p] Si vicinum mihi fundum mercato, venditor in mea turre demonſtret, vacuamque ſe poſſeſſionem tradere dicat: non minus poſſidere cœpi, quam ſi pedem finibus intuliſſem. *l.* 18. §. 2. *ff. de acq. vel amitt. poſſ.*

[q] Secundùm conſenſum auctoris, in poſſeſſionem ingreſſus, rectè poſſidet. *l.* 12. *C. de contr. empt.*

[r] Is qui rogavit ut precario in fundo moretur, non poſſidet: ſed poſſeſſio apud eum qui conceſſit, remanet. *l.* 6. §. 2. *ff. de precario. l. ult. eod.* Precarium eſt quod precibus petentis utendum conceditur tamdiu quamdiu is qui conceſſit patitur. *l.* 1. *eod.* See the ſecond Article of the firſt Section of the Loan of things to be reſtored in ſpecie, and of a precarious Loan.

[s] Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo, uſumfructum ejus retinuerit, etiamſi ſtipulatus non fuerit, eam continuò tradidiſſe credatur: nec quid ampliùs requiratur, quo magis videatur facta traditio. *l.* 28. *C. d. donat. l.* 35. §. *ult. eod.* See the third Article of the ſecond Section of Donations.

This Article regards only the Delivery, and not the ways of taking Poſſeſſion; of which mention ſhall be made in the Title of Poſſeſſions.

VIII.

8. *The Clauſe of precarious Poſſeſſion tacitly underſtood.*

If the Clauſe of precarious Poſſeſſion has been omitted in a Contract for ſelling an Immoveable Thing, it is tacitly underſtood, as to the effect of giving the Buyer a right to take Poſſeſſion of the Thing, if it is not already poſſeſſed by others. For the Sale transferring the Property of the thing, it implies the conſent of the Seller, that the Buyer ſhould take Poſſeſſion of it[t].

[t] Qui fundum dari ſtipularetur, vacuam quoque poſſeſſionem tradi oportere, ſtipulari intelligitur. *l.* 3. §. 1. *ff. de act. empt. & vend.* ſecundùm conſenſum auctoris in poſſeſſionem ingreſſus rectè poſſidet. *l.* 12. *C. de contr. empt.*

IX.

9. *Delivery of Things Incorporeal.*

Things incorporeal, ſuch as an Inheritance, a Debt, or any other Right, cannot properly be delivered[u], no more than touched[x]; but the power of uſing them is in lieu of Delivery. Thus, the Seller of a Right of Service does as it were deliver it, when he ſuffers the Buyer to make uſe of it[y]. Thus, he who ſells or transfers a Debt, or any other right, gives to the Buyer, or Aſſignee, a kind of Poſſeſſion by the power which he gives them to exerciſe this Right, in cauſing the Transfer, or Aſſignment, to be intimated to the Debtor, who after the ſaid intimation, cannot own any other Maſter, or Poſſeſſor of this Right, but the Aſſignee to whom it is transferred.

[u] Incorporales res traditionem & uſucapionem non recipere manifeſtum eſt. *l.* 43. §. 1. *ff. de acq. rer. dom.*

[x] Incorporales ſunt, quæ tangi non poſſunt, qualia ſunt ea quæ in jure conſiſtunt. §. 2. *inſt. de reb. corp.*

[y] Ego puto uſum ejus juris pro traditione poſſeſſionis accipiendum eſſe. *l. ult. ff. de ſervit.*

X.

10. *The firſt effect of the Delivery, is the tranſlation of the full Property.*

The firſt effect of the Delivery is, that if the Seller is the right Owner of the thing ſold, the Buyer becomes at the ſame time fully Maſter of it, and acquires a right to enjoy it, to uſe it, and to diſpoſe of it[z], he paying the Price, or giving Surety to the Seller; unleſs the Seller is contented with the ſimple Bond, or Promiſe of the Buyer[a]. And it is this effect of the Delivery which is the perfect accompliſhment of the Contract of Sale.

[z] Traditionibus, & uſucapionibus dominia rerum, non nudis pactis transferuntur. *l.* 20. *C. de pact.* per traditionem jure naturali res nobis acquiruntur. Nihil enim tam convenieus eſt naturali æquitati, quàm voluntatem domini volentis rem ſuam in alium transferre, ratam haberi. Et ideo, cujuſcunque generis ſit corporalis res, tradi poteſt: & à domino tradita, alienatur. §. 40. *inſt. de rer. diviſ.* Nunquam nuda traditio transfert dominium, ſed ita ſi venditio, aut aliqua juſta cauſa præceſſerit, propter quam traditio ſequeretur. *l.* 31. *ff. de acq. rer. dom.*

[a] Venditæ res, & traditæ non aliter emptori acquiruntur, quàm ſi is venditori pretium ſolverit, vel alio modo ei ſatisfecerit. §. 41. *inſt. de rer. div.* Quod vendidi non aliter fit accipientis, quàm ſi aut pretium nobis ſolutum ſit, aut ſatis eo nomine factum, vel etiam fidem habuerimus emptori ſine ulla ſatisfactione. *l.* 19. *ff. de contr. empt. l.* 53. *eod.*

This Article is not contrary to what has been ſaid in the ſecond Article of the firſt Section, that the Sale is perfected by the bare conſent. For we muſt diſtinguiſh in the Contract of Sale, and in all other Contracts which are perfected by the bare conſent, two ſorts, or two degrees of perfection.

The firſt ſort is that which is mentioned in the ſecond Article of the firſt Section; and the ſecond is that which is here ſpoken of in this tenth Article. The difference betwixt them conſiſts in this, that the bare conſent forms only the Engagement of the Contractors to perform reciprocally what they promiſe to one another. Thus, the Seller is bound to deliver the thing ſold, and the Buyer to pay the Price; and it is in this ſenſe, that the Contract of Sale is perfected by the bare conſent. But there is ſtill wanting a ſecond accompliſhment which conſiſts in the execution of theſe Engagements, and has this effect; that whereas the Contract of Sale without Delivery does not make the Buyer Maſter and Poſſeſſor, and does not give him a right to enjoy, to uſe, and to diſpoſe of the thing ſold, but only a right to demand the Delivery of it; this Delivery of the thing, together with the Payment of the

the Price, conſummates the Sale, and makes the Buyer fully Maſter and Poſſeſſor of the thing; which was the end of the Contract of Sale. See concerning theſe accompliſhments of the Sale, the fourteenth and fifteenth Articles of the twelfth Section, as alſo the ſixth Law. *Cod. de hared. vel act. vend.*

XI.

11. *Another effect of the Delivery, with reſpect to him who has bought the thing honeſtly from one who was not the right Owner; and that is the right of enjoying it.*

If the Seller was not the right Owner of the thing ſold, the Buyer does not become Maſter of it, by having it delivered to him[b]. But if he has bought the thing honeſtly and fairly, believing that the Seller was Maſter of it; he looks upon himſelf, and is ſo lookt upon by others, as if he were in effect the true Owner of the thing. And this Poſſeſſion of the Buyer's, which he has ground to believe to be a rightful and lawful Poſſeſſion, ought to have the ſame effect as if he were really and truly Maſter of the thing. Thus he poſſeſſes it, enjoys it, and makes the fruits his own, without being in danger of reſtoring what he has uſed and conſumed during the time he was ignorant that the thing belonged to another perſon[c].

[b] Traditio nihil amplius transferre debet, vel poteſt ad eum qui accipit, quàm eſt apud eum qui tradit. *l.* 20. *ff. de acquir. rer. dom.*

[c] Si quis à non domino quem dominum eſſe crediderit, bona fide fundum emerit, vel ex donatione, aliâve qualibet juſta cauſa, æquè bona fide acceperit, naturali ratione placuit, fructus quos percepit ejus eſſe pro cultura & cura. Et ideò ſi poſtea dominus ſupervenerit, & fundum vindicet: de fructibus ab eo conſumptis agere non poteſt. §. 35. *inſt. de rer. div.* Dolum authoris, bonæ fidei emptori non nocere, certi juris eſt, *l.* 3. *C. de per. & com. rei vend.*

To underſtand rightly the meaning of theſe words, pro cultura & cura, *which are in the thirty-fifth Section, Inſt. de rer. diviſ. it is fit to take notice of the words of the twenty-fifth Law, ff. de uſur.* omnis fructus non jure ſeminis, ſed jure ſoli percipitur: *And likewiſe the Poſſeſſor who comes fairly and honeſtly by the Poſſeſſion does enjoy the Fruits which grow without ſowing, and without cultivating.*

XII.

12. *Another effect of the Delivery, the right to preſcribe.*

Another effect of the Delivery of the thing ſold, altho' the Seller were not the Maſter of it, is, that the Buyer, who believes the Seller to be the right Owner, preſcribes; and acquires the Property after a ſufficient Poſſeſſion, that is conformable to the Rules which ſhall be explained in the Title of Poſſeſſion, and Preſcriptions[d].

[d] Pars quæ putatur eſſe vendentis, per longam poſſeſſionem ad emptorem tranſit. *l.* 43. *ff. de acq. vel amitt. poſſ. l.* 26. *eod.*

XIII.

13. *Another effect of the Delivery between two Buyers of the ſame thing.*

If the ſame thing is ſold to two Buyers, whether by the ſame perſon, or by two different Sellers; the firſt of the two to whom it has been delivered, and who is in poſſeſſion of it, will be preferred, altho' the thing was ſold firſt to the other perſon; unleſs it be that one of the Sellers was not the Maſter of the thing ſold, and that the other was; for in this caſe he who bought it of the Maſter will be preferred to him to whom the thing was delivered[e]. And in all the caſes, the other Buyer will have his Action of Warranty againſt his Seller[f].

[e] Si duobus quis ſeparatim vendiderit bona fide ementibus, videamus quis magis publiciana uti poſſit, utrum is cui priori res tradita eſt, an is qui tantùm emit. Et Julianus libro ſeptimo digeſtorum ſcripſit, ut, ſi quidem ab eodem non domino emerint, potior ſit cui priori res tradita eſt: quod ſi à diverſis non dominis melior cauſa ſit poſſidentis, quàm petentis. Quæ ſententia vera eſt. *l.* 9. §. 4. *ff. de public. in rem act.* uterque noſtrûm eamdem rem emit à non domino: cùm emptio venditioque ſine dolo malo fieret, traditaque eſt: ſive ab eodem emimus, ſive ab alio, atque alio; is ex nobis tuendus eſt, qui prior jus ejus apprehendit. Hoc eſt, cui primùm tradita eſt. Si alter ex nobis à domino emiſſet, is omnimodo tuendus eſt. *l.* 31. §. 2. *ff. de act. empt. & vend.* Quoties duobus in ſolidum prædium jure diſtrahitur, manifeſti juris eſt, eum cui priori traditum eſt, in detinendo dominio eſſe potiorem. *l.* 15. *C. de rei vend.*

[f] Quoniam contractus fidem fregit: ex empto actione conventus, quanti tua intereſt præſtare cogetur. *l.* 6. *C. de hared. vel act. vend.*

This Rule may ſeem contrary to that which is contained in the ſecond Article of the firſt Section, and to the Rule of the ſecond Article of the ſeventh Section. For by theſe two Rules the Sale is ſo far accompliſhed by the bare effect of the conſent, that if the thing ſold periſhes before it is delivered, the loſs is the Buyer's; from whence it would ſeem to follow that the Buyer was already Maſter of the thing; and that therefore by the ſecond Sale the Seller ſold the thing belonging to another perſon, and that the firſt Buyer may claim it as his. But, as we have already remarked on the tenth Article of this Section, it is only by the Delivery that the Sale receives its full Accompliſhment, which makes the Purchaſer Maſter of the thing ſold. Thus, he who buys the laſt, but of the Seller who has the thing ſtill in his poſſeſſion, and gets poſſeſſion of the thing, is preferred to the firſt Buyer, who has himſelf to blame for not taking poſſeſſion of the thing, in order to make himſelf Maſter of it. And it is likewiſe for the intereſt of the Publick, that perſons ſhould not be diſturbed in their poſſeſſions by Sales tranſacted in private, or antidated. It is upon theſe Principles that ſome Cuſtoms have expreſly determined, that a ſecond Purchaſer of an Eſtate, who gets firſt Poſſeſſion of it, is preferred to him who had bought it firſt.

XIV.

14. *Of the Time of Delivery.*

The Delivery of the thing ſold ought to be at the time regulated by the Contract. And if the Contract ſays nothing of it, the Seller ought to deliver the thing without delay; unleſs the Delivery ſhould require that the thing be tranſported into another place, for the doing of which a delay would be neceſſary[g].

[g] Quoties

[g] Quoties in obligationibus dies non ponitur, præſenti die pecunia debetur. Niſi ſi locus adjectus, ſpatium temporis inducat: quo illo poſſit perveniri. *l.* 41. §. 1. *ff. de verb. obl.* §. 2. *inſt. eod.*

See the fifth Article of the third Section of Covenants.

XV.

15. *Of the Place of Delivery.*

The Delivery ought to be in the place agreed on. And if the Contract makes no mention of the Place of Delivery, the Seller ought to deliver the thing ſold in the place where it happens to be at the time; unleſs the intention of the Contracters ſeems to demand, that the Delivery ſhould be made in another place [h].

[h] *See the ſixth Article of the third Section of Covenants.* V. l. ult. ff. de con. trit. l. 22. in fine ff. de reb. cred.

XVI.

16. *Damages for the delay of Delivery.*

If the Seller fails to deliver the thing ſold on the day, and at the place where the Delivery ought to be made; he ſhall be bound to make good the Damages which the Buyer ſhall ſuſtain by his delay [i], purſuant to the Rules which follow.

[i] Si res vendita non tradatur, in id quod intereſt, agitur. Hoc eſt, quod rem habere intereſt emptoris. *l.* 1. *ff. de act. empt. vend. l.* 11. §. 9. *eod. l.* 4. & 10. *C. eod.*

XVII.

17. *Wherein conſiſt the Damages.*

The Seller who is in delay to deliver the thing ſold, is accountable for the damage which his delay ſhall have occaſioned, according to the condition of the things, and the circumſtances. Thus, the Seller of an Eſtate who is in delay to deliver it, ought to reſtore to the Buyer the value of the Fruits which he has hindered him from enjoying. Thus, he who was obliged to deliver on a certain day, in a certain place, Corn, Wine, or other Proviſions, of which the Price was riſen on the day, and at the place where they were to have been delivered, is bound to pay to the Buyer the value at which they were on the day, and at the place appointed for delivery, in order to make up either the profit which the Buyer might have made by ſelling the things again at that place; or the loſs which he ſuffers, if for his own uſe he was obliged to buy others at a higher price than what he had agreed to give at the time of the Sale [l].

[l] Non ſolum quod ipſe per eum acquiſii, præſtare debeo: ſed & id quod emptor, jam tunc ſibi tradito ſervo acquiſiturus fuiſſet. *l.* 31. §. 1. *ff. de act. empt. & vend.* cum per venditorem ſteterit, quominus rem tradat, omnis utilitas emptoris in æſtimationem venit, quæ modo circa ipſam rem conſiſtit. *l.* 21. §. 3. *ff. de act. empt. & vend.* Si merx aliqua quæ certo die dari debebat, petita ſit, veluti vinum, oleum, frumentum: tanti litem æſtimandam Caſſius ait, quanti fuiſſet eo die quo dari debuit. *l. ult. ff. de condict. trit.* idemque juris in loco eſſe, ut æſtimatio ſumatur ejus loci, quo dari debuit. *d. l.* Quoties in diem, vel ſub conditione oleum quis ſtipulatur, ejus æſtimationem eo tempore ſpectari oportet, quo dies obligationis venit tunc enim ab eo peti poteſt. *l.* 59. *ff. de verb. obl.*

XVIII.

18. *Conſequences of Gain, or Loſs, which enter not into the Damages.*

The Profit or Loſs, which is to be computed as part of the Damages of the Buyer, ought to be reſtrained to that which may be imputed to the delay, and which is a natural and ordinary conſequence of it, and which it was eaſy to foreſee: Such as the Damages explained in the caſe of the preceding Article; and ſuch as would likewiſe be in the ſame caſe, the charges which the Buyer had been at, in going to receive, and to tranſport the Proviſions which he had bought, and the other immediate conſequences which it is natural to expect from the delay. But we ought not to extend the Damages to conſequences that are more remote, and altogether unforeſeen, which are rather an extraordinary effect of ſome event, and of ſome conjuncture of affairs flowing from the Divine Providence, than of the delay of the Delivery. Thus, for example, if the Seller not delivering at the time and place Corn which he has ſold, the Buyer has, for want of having the Corn delivered to him, miſſed an opportunity of ſending that Corn to another place, and of ſelling it there at a higher rate than it was at in the place where it ought to have been delivered: Or if for want of having that Corn, he has been obliged to ſend away Workmen, and put a ſtop to a Work, the interruption of which occaſions him a conſiderable loſs; the Seller will not be bound to make good neither this Gain which the Buyer has miſſed of, nor this Damage which he has ſuffered, which are not ſo much Conſequences that may be imputed to the delay of the Delivery, as Effects of the Divine Providence, and Accidents for which no man ought to be accountable [m].

[m] Cùm per venditorem ſteterit, quominùs rem tradat, omnis utilitas emptoris in æſtimationem venit: quæ modò circa ipſam rem conſiſtit. Neque enim ſi potuit ex vino puta negotiari, & lucrum facere, id æſtimandum eſt, non magis quàm ſi triticum emerit, & ob eam rem quòd non ſit traditum, familia ejus fame laboraverit. Nam pretium

tritici, non ſervorum fame necatorum, conſequitur. *l.* 21. §. 3. *ff. de act. empt. & vend.* ut non ſit cogitatum a venditore de tanta ſumma. *l.* 43. *in f. ff. eod.*

See the Title of Intereſts, Coſts, and Damages, and Reſtitution of Fruits.

XIX.

19. *Damages are due, whether the Sale ſubſiſts, or not.*

Beſides the Damages which the Seller is liable to for not delivering the thing ſold, he incurs likewiſe on the ſame account another Penalty, which is, that the Sale may be annulled, if there is ground for it. As, for inſtance, if he who was obliged to deliver a Merchandize on the day of an Imbarkation, or on the day of a Fair, fails to do it, he will be obliged to take back his Goods if the Buyer pleaſes, and to reſtore the Price, if he has already received it. And he will be moreover bound to make good the Damages, for not having delivered the Goods at the time and place appointed. And even in the caſes where the Sale ſubſiſts, the Seller is nevertheleſs bound to make good the Damages. Thus, the Seller who by delaying to deliver an Eſtate which he has ſold, deprives the Purchaſer of the enjoyment of the Fruits, is bound in the Value of the Fruits, although this delay be not enough to annul the Sale[n].

[n] *This Rule is a Conſequence of the former.*

XX.

20. *It does not depend on the Seller to annul the Sale, by his failing to deliver the thing.*

It never depends on the Buyer to elude the effect of the Sale, by his failing to make delivery of the thing; and he may be always forced to deliver it, if it is poſſible; provided that the Buyer performs his part of the Contract. In the ſame manner likewiſe the Buyer cannot procure the Sale to be annulled, by his not paying the Price at the term appointed[o], as ſhall be made appear in the proper place.

[o] *V. l.* 2. *&* 3. *ff. de lege commiſſ.* quod ab initio ſponte ſcriptum, aut in pollicitationem deductum eſt, hoc ab invitis poſtea compleatur. *l. ult. C. ad Vell. l.* 5. *C. de obl. & act.* See the nineteenth Article of the fourth Section of Covenants; and the ninth Article of the following Section.

XXI.

21. *The Delivery hindered by an accident.*

If the Delivery is hindered by an accident; as if the Seller has been robbed of the thing ſold *(that is, if it has been taken from him by force)* the Seller will not be liable to Damages[p]; unleſs the accident happened after he was in fault for not delivering it, according to the Rule explained in the third Article of the ſeventh Section.

[p] Si ea res quam ex empto præſtare debebam, vi mihi adempta fuerit, quamvis eam cuſtodire debuerim: tamen propius eſt, ut nihil amplius quam actiones perſequendæ ejus, præſtari à me emptori oporteat. Quia cuſtodia adverſus vim parùm proficit. *l.* 31. *ff. de act. empt. & vend.* Quidquid ſine dolo & culpa venditoris accidit in eo venditor ſecurus eſt. §. 3. *inſt. de empt.*

XXII.

22. *If the Seller is in hazard of loſing the Price, he is not obliged to deliver the Thing.*

If the Seller is in manifeſt danger of loſing the Price, thro' the Inſolvency of the Buyer, or for other cauſes, he may keep the thing ſold, by way of Pledge, until the Buyer has given him Security for his payment[q].

[q] *In the ſame manner as the Buyer cannot be obliged to pay the Price, if he is in danger of an Eviction.* Ante pretium ſolutum, dominii quæſtione mota, pretium emptor ſolvere non cogetur: niſi fidejuſſores idonei à venditore ejus evictionis offerantur. *l.* 18. §. 1. *ff. de per. & com. r. v.* venditor, pignoris loco, quod vendidit, retinet, quoad emptor ſatisfaciat. *l.* 31. §. 8. *ff. de ad. ed. v. l.* 22. *ff. de hered. vel act. vend.* See the eleventh Article of the third Section.

XXIII.

23. *The Seller and Buyer both in delay.*

If the Buyer and Seller are equally in delay, the one in receiving, and the other in delivering; the Buyer, whoſe fault it is that he did not ſooner receive the thing ſold, cannot complain of the delay of the Delivery[r].

[r] Si & per emptorem & venditorem mora fuiſſet quominus vinum præberetur, & traderetur: perinde eſſe ait, quaſi ſi per emptorem ſolum ſtetiſſet. Non enim poteſt videri mora, per venditorem emptori facta eſſe, ipſo moram faciente emptore. *l.* 51. *ff. de act. empt. vend. l.* 17. *ff. de contr. empt.*

Of the CUSTODY *of the Thing ſold.*

XXIV.

24. *What care the Seller ought to take of the thing ſold.*

If the thing ſold remain in the cuſtody of the Seller, he is obliged to take care of it until the Delivery; not only in the ſame manner as he takes care of what is his own, but he is to take the ſame care of it as he who has borrowed a thing for his own uſe[s]. And he is to be accountable, not only for what he may do knaviſhly, but for every neglect, and every fault which a careful and diligent Maſter of a Family would not readily fall into[t]. Becauſe the Contract of Sale is as much for the intereſt of the Seller, as of the Buyer[u].

[s] Cuſtodiam venditor talem præſtare debet, quam præſtant hi quibus res commodata eſt. Ut diligentiam præſtet exactiorem, quam in ſuis rebus adhiberet. *l.* 3. *ff. de per. & commodo rei vend.* See the ſecond Article of the ſecond Section of the Loan of things to be reſtored in ſpecie.

[t] Si

[t] Si venditor eam diligentiam adhibuiſſet in inſula cuſtodienda, quam debent homines frugi, & diligentes præſtare; ſi quid accidiſſet, nihil ad eum pertinebit. *l.* 11. *cod.* Dolum, & culpam *recipiunt* mandatum, commodatum, venditum. *l.* 23. *ff. de reg. jur.* In his quidem & diligentiam. *d. l.* 23. Talis cuſtodia deſideranda eſt à venditore, qualem bonus paterfamilias ſuis rebus adhibet. *l.* 35. §. 4. *ff. de contr. empt.*

[u] Ubi utriuſque utilitas vertitur ut in empto — & dolus de culpa præſtatur. *l.* 5. §. 2. *ff. commod.*

XXV.

25. The care which the Seller is to take, may be regulated by agreement.

If it is agreed to eaſe the Seller of the trouble of looking after the thing ſold, or if the parties have regulated the manner in which the Seller ſhall be bound to take care of it; he will be no farther obliged, than to take ſuch care as is ſpecified in the Agreement [x]. And moreover, he will be accountable for whatever may happen thro' his Knavery [y]; or thro' any Neglect of his which is ſo groſs as to border upon Fraud [z].

[x] Sed hæc ita, niſi ſi quid nominatim convenit, vel plus, vel minus in ſingulis contractibus. Nam hoc ſervabitur, quod initio convenit. Legem enim contractus dedit. *l.* 23. *ff. de reg. jur. l.* 35. §. 4. *ff. de contr. empt.*

[y] Non valere ſi convenerit ne dolus præſtetur. *d. l.* 23. *ff. de reg. jur.*

[z] Diſſoluta negligentia prope dolum eſt. *l.* 29. *ff. mand.*

XXVI.

26. If it is the Buyer's fault that he does not receive the Goods, the Seller is diſcharged from his Obligation to take care of them.

If the Buyer is in delay to receive the thing ſold, whether it be after the term fixed for the Delivery, or after giving the Buyer warning, if no term is fixed; the Seller ſhall be diſcharged from his Obligation to take care of it; and ſhall be no farther liable than for what may happen thro' his Knavery [a].

[a] Illud ſciendum eſt, cùm moram emptor adhibere cœpit, jam non culpam ſed dolum malum tantùm præſtandum à venditore. *l.* 17. *ff. de per. & com.* Vino per averſionem vendito finis cuſtodiæ eſt avehendi tempus, quod ita erit accipiendum, ſi adjectum tempus, eſt. Cæterùm ſi non ſit adjectum, videndum ne infinitam cuſtodiam non debeat venditor. Et eſt verius, ſecundum ea quæ ſupra oſtendimus, aut intereſſe quid de tempore actum ſit, aut denuntiare ei, ut tollat vinum. *l.* 4. §. *ult. cod.*

Of WARRANTY.

WArranty being a conſequence of Eviction, the Rules concerning it ſhall be explained in the tenth Section, which treats of this Matter.

Of declaring the Faults of the Thing ſold.

THE Engagement which the Seller is under to declare the Faults of the thing ſold, is a part of the matter of Redhibition; and the Rules concerning it ſhall be explained in the eleventh Section.

The engagement of the Seller not to ſell too dear.

I have not ſet down in the number of Engagements under which the Seller is to the Buyer, the natural duty of not ſelling too dear *: Becauſe there would be too many inconveniencies in annulling Sales on account of exceſs in the Price. And the Civil Policy connives at an Injuſtice which the Buyers uſually ſuffer willingly; and reſtrains it only in the Sale of ſuch things as have their Price regulated by the Publick.

* And if thou ſell ought unto thy neighbour, or buyeſt ought of thy neighbour's hand, ye ſhall not oppreſs one another. *Levit.* xxv. 14.

That no Man go beyond and defraud his brother in any matter. 1 *Theſſ.* iv. 6.

SECT. III.

Of the Engagements which the Buyer is under to the Seller.

The Engagement of the Buyer, not to buy at too low a price.

THE principal Engagement which the Buyer is under to the Seller, is that of Humanity, and of the Law of Nature, which obliges him not to take advantage of the neceſſitous condition of the Seller, to buy the thing at too low a Price [a]. But becauſe of the difficulties in fixing the juſt Price of things, and of the inconveniencies which would be too many and too great if all Sales were annulled, in which the things were not ſold at their juſt value; the Laws connive at the injuſtice of Buyers, with reſpect to the Price of Sales, except in the Sale of Lands, where the Price given for them is leſs than the half of their juſt value [b]; purſuant to the Rules which ſhall be explained in the ninth Section; and in this Section we ſhall only inſert the other Engagements which the Buyer is under to the Seller.

[a] And if thou ſell ought unto thy neighbour, or buyeſt ought of thy neighbour's hand, ye ſhall not oppreſs one another. *Levit.* xxv. 14.

[b] *See the Preamble to the Title of the Vices in Covenants, and the ſecond Article of the third Section of the ſame Title.*

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I.

1. Engagement of the Buyer to pay the Price.

THE firſt Engagement which the Buyer is under, is to pay the Price, and to pay it on the day, and at the place regulated by the Sale; whether it be at the time of the delivery of the thing ſold, or before, or after; according as has been agreed on. For the Buyer does not become Maſter of the thing ſold but by this Payment, or by ſome other Surety which is in lieu of it [a].

[a] Pretium in numerata pecunia conſiſtere debet. §. 2. *inſt. de empt. & vend.* Quod vendidi non aliter fit accipientis quàm ſi aut pretium nobis ſolutum ſit, aut ſatis eo nomine factum. *l. 19. l. 53. ff. de contr. empt.* §. 41. *inſt. de rer. div.*

II.

2. The time and place of Payment.

If there is nothing regulated by the Sale, as to the time and place of Payment; the Buyer ought to pay the Price at the time and place where the Goods are delivered [b].

[b] In omnibus obligationibus in quibus dies non ponitur, præſenti die debetur. *l. 14. ff. de reg. jur. l. 41.* §. 1. *ff. de verb. obl.* See the fifth and ſixth Articles of the third Section of Covenants.

III.

3. The Seller may detain the thing ſold for lack of payment.

If the Buyer does not pay at the time appointed, and the Seller has not as yet delivered the Goods; he may keep them by way of Pledge until he be paid [c].

[c] Venditor pignoris loco quod vendidit r quoad emptor ſatisfaciat. *l. 31.* §. 8. *ff. ed. l. 13.* §. 8. *ff. de act. empt. & vend.*

IV.

4. Delay cauſed by an accident.

The Buyer is not faulty for not making payment, if he delays it only becauſe of an obſtacle which he meets with from ſome accident. As if the overflowing of a River hinders him from going to the place where he ought to make payment [d].

[d] *See the twenty-firſt Article of the preceding Section.* Mora videtur eſſe, ſi nulla difficultas venditorem impediat. *l. 3.* §. *ult. ff. de act. empt.*

V.

5. The Intereſt of the Money is inſtead of all Damages occaſioned by the delay of payment of the Price.

The Buyer is bound in no other damages, for the bare delay of paying the Price, but the Intereſt of the Money [e]. And whatever loſs the failure of payment may have cauſed, or whatever profit it may have prevented, the Reparation of the Damage occaſioned by the failure of Payment is reduced to the Intereſt of the Money; this being regulated by the Law to be inſtead of all Damages of this kind, as ſhall be explained in the Title of Damages.

[e] Venditori ſi emptor in pretio ſolvendo moram fecerit, uſuras dumtaxat præſtabit, non omne omnino quod venditor mora non facta, conſequi potuit. Veluti, ſi negotiator fuit, & pretio ſoluto ex mercibus, pluſquam ex uſuris quærere potuit. *l. ult. ff. de per. & comm. rei vend.*

VI.

6. Three caſes in which the Buyer owes the Intereſt of the Price.

The Buyer owes the Intereſt of the Price in three caſes. By Agreement, if it is ſtipulated. By a Legal Demand, if after the term of Payment is come, he pays not: And by the nature of the thing ſold, if it produces Fruits or other Revenues, ſuch as a Field, or a Houſe, the Intereſt of the Price is due without either Covenant, or Legal Demand [f].

[f] Initio venditionis ſi pactus es, ut is cui vendidiſti, poſſeſſionem, pretii tardiùs exoluti, tibi uſuras penſitaret: non immerito exiſtimas etiam eas tibi adito præſide Provinciæ, ab emptore præſtari debere. Nam ſi initio contractus non es pactus, ſi cœperis experiri, deberi ex mora dumtaxat uſuras. *l. 5. C. de pact. inter empt. & vend. comp.* Curabit præſes Provinciæ compellere emptorem qui nactus poſſeſſionem, fructus percepit, partem pretii quam penes ſe habet, cum uſuris reſtituere. *l. 5. C. de act. empt. & vend. l. 2. C. de uſur. l. 13.* §. 20. *ff. de act. empt. & vend. l. 16.* §. 1. *ff. de uſur.*

VII.

7. If the Seller takes back his Goods for want of payment.

If in default of Payment of the Price, the Seller finds himſelf obliged to detain, or to take back the thing ſold, and its value be diminiſhed; the Buyer will be bound to indemnify the Seller for this diminution,

tion, as far as the Price which was agreed on amounts to [g].

[g] *This Rule is a conſequence of the nature of the Contract of Sale. For the Sale being perfected, the full Price is due, whatever change may happen to the thing ſold, as ſhall be afterwards ſhewn in the ſecond Article of the ſeventh Section.*

Si vinum venditum acuerit, vel quid aliud vitii ſuſtinuerit: emptoris erit damnum. *l. 1. ff. de per. & com. r. v.* Poſt perfectam venditionem, omne commodum, & incommodum quod rei venditæ contingit, ad emptorem pertinet. *l. 1. C. de per. & com. r. v.*

VIII.

8. *Diſſolution of the Sale for Non-Payment.*

If the Buyer does not pay at the term of Payment after the delivery of the Goods, the Seller may demand the Sale to be annulled, for want of Payment. And the Judge will decree it to be void, either immediately, if there is danger that the Seller loſe both the Thing and the Price; or if there is no danger of this, after a delay according to the circumſtances. And this delay is not refuſed, altho' it ſhould be expreſly mentioned in the Contract, that the Sale ſhould be diſſolved if punctual payment were not made at the time appointed [h].

[h] Spatium datum videri: hoc idem dicendum & cùm quid ea lege venierit, ut niſi ad diem pretium ſolutum fuerit, inempta res fiat. *l. 23. in f. ff. de obl. & act.*

See the eleventh and twelfth Articles of the twelfth Section of this Title. V. l. 38. ff. de min. in his verbis, lex commiſſoria diſplicebat ei.

IX.

9. *It does not depend on the Buyer to elude the Sale by his not paying.*

It never depends on the Buyer to elude the effect of the Sale, by his failing to pay the Price. And the Seller hath it always in his choice to force him to make payment, if on his part he performs what he is bound to by the Contract [i].

[i] Ita accipitur inemptus eſſe fundus, ſi venditor inemptum eum eſſe velit, quia id venditoris cauſa caveretur. *l. 2. ff. de leg. commiſſ. l. 3. eod.*

X.

10. *Another Engagement which the Buyer is under, as to the Expences which fall to his ſhare to pay, and the damage for which he is accountable.*

If betwixt the time of the Sale and Delivery the Seller is obliged to be at any charge in preſerving the thing ſold: or if he ſuſtains any damage by the delay of the Buyer to take it away; as if Materials that were ſold take up a place, the Rent of which muſt be paid, or the place being the Seller's own, he loſes the Rent of it, the Buyer ſhall be bound to refund this Charge, and to make good this Damage [l].

[l] Præterea ex vendito agendo conſequetur etiam ſumptus, qui facti ſunt in re diſtracta, ut puta ſi quid in ædificia diſtracta erogatum eſt. *l. 13. §. 22. ff. de act. empt. & vend.* Si is qui lapides ex fundo emerit, tollere eos nolit ex vendito, agi cum eo poterit, ut eos tollat. *l. 9. ff. eod.*

XI.

11. *The Buyer is not obliged to pay the Price, if he is in danger of an Eviction.*

If the Buyer diſcovers before Payment, that he is in danger of an Eviction, and if he makes this appear, he cannot be compelled to pay the Price, till after he is ſecured in his Poſſeſſion [m].

[m] Ante pretium ſolutum, dominii quæſtione motâ, pretium emptor ſolvere non cogetur; niſi fidejuſſores idonei à venditore, ejus evictionis offerantur. *l. 18. §. 1. ff. de per. & comm. r. vend.* See the twenty-ſecond Article of the ſecond Section.

XII.

12. *Another Engagement of the Buyer.*

This is another Engagement which the Buyer is under to the Seller, that he is bound to take care of the thing which he has bought, in all the caſes where it may happen that the Sale may be diſſolved; whether by his own act and deed, as by his failing to pay the Price, or by the effect of a Clauſe of the Contract, as if there was inſerted in it a Power of Redemption. And in theſe and the like caſes, the Buyer ought to be reſponſible for the bad condition in which the thing may happen to be thro' his fault, or negligence [n].

[n] *In the ſame manner, and for the ſame reaſons, that the Seller is obliged to take care of the thing ſold, before the Delivery.*

See the twenty-fourth Article of the foregoing Section.

SECT. IV.

Of the Merchandize, or Thing which is ſold.

The CONTENTS.

1. *What Things may be ſold.*
2. *Things incorporeal, ſuch as Rights, may be ſold.*
3. *Sale of things to come.*
4. *Sale of an uncertain Expectation.*
5. *Sale in groſs and by the bulk.*
6. *Sale by Number, Weight, and Meaſure.*
7. *How Sales by Wholeſale and Retail are accompliſhed.*
8. *Sale upon Tryal.*
9. *The Acceſſories of a thing ſold are included in the Sale.*
10. *Things ſeparate from the Edifice, which are included in the Sale.*
11. *Acceſſories of Moveables.*
12. *In the Sale of one of two things, the choice belongs to the Seller.*
13. *Sale of a thing belonging to another perſon.*

I.

1. *What Things may be ſold.*

ALL ſorts of things may be ſold, except thoſe of which the Commerce is impoſſible, or prohibited by Nature, or by ſome Law [a], purſuant to the Rules which ſhall be explained in the eighth Section.

[a] Omnium rerum quas quis habere, vel poſſidere, vel perſequi poteſt, venditio rectè fit. Quas verò natura, vel gentium jus, vel mores civitatis commercio exuerunt, earum nulla venditio eſt. *l.* 34. §. 1. *ff. de contr. empt.*

II.

2. *Things Incorporeal, ſuch as Rights, may be ſold.*

We may ſell not only things Corporeal, ſuch as Moveables and Immoveables, Animals, Fruits; but likewiſe Things Incorporeal, ſuch as a Debt, an Inheritance, a Service, and all other Rights [b].

[b] Toto titulo *ff.* & *C.* de hæreditate vel actione vendita.

III.

3. *Sale of things to come.*

Sometimes Things to come are ſold, as the Fruits which ſhall be gathered in a Ground, the Animals which ſhall be born, and other things of the like nature, altho' they are not as yet in being [c].

[c] Fructus, & partus futuri, rectè emuntur. *l.* 8. *ff. de contr. empt.*

IV.

4. *Sale of an uncertain Expectation.*

It happens likewiſe ſometimes that people ſell an uncertain Expectation, as when a Fiſherman ſells a draught of Fiſhes, before he throws his net. And altho' he catch nothing, yet the Sale ſubſiſts; for it was the Expectation that was ſold, and the right of having whatever ſhould be taken [d].

[d] Aliquando tamen & ſine re venditio intelligitur, veluti cùm quaſi alea emitur. Quod fit cùm captus piſcium, vel avium, vel miſſilium emitur. Emptio enim contrahitur, etiamſi nihil inciderit: quia ſpei emptio eſt. *l.* 8. §. 1. *ff. de contr. empt.*

V.

5. *Sale in groſs and by the bulk.*

We may ſell a great many things at the ſame time, in one and the ſame Sale, and for one and the ſame Price, in groſs and by the bulk; as if we ſell all the Goods that are in a Shop, or in a Ship, all the Corn that is in a Granary, or all the Wine that is in a Cellar [e].

[e] Univerſum quod in horreis erat poſitum. *l.* 2. *C. de per. & com. ven. rend.* Si omne vinum, vel oleum, vel frumentum, vel argentum quantumcunque eſſet uno pretio venierit. *l.* 35. §. 5. *ff. de contr. empt.*

VI.

6. *Sale by Number.*

Proviſions, or other things which are counted, weighed, or meaſured, may be ſold either in groſs or by the bulk, for one and the ſame price; or at the rate of ſo much for every Piece, for every Pound, for every Buſhel, or other Meaſure [f].

[f] Quod ſi vinum ita venierit, ut in ſingulas amphoras, item oleum ut in ſingulos metretas, item frumentum ut in ſingulos modios, item argentum ut in ſingulas libras certum pretium diceretur. *l.* 35. §. 5. *ff. de contr. empt.* Grex in ſingula corpora. *d. l.* §. 6.

VII.

7. *How Sales by Wholeſale and Retail are accompliſhed.*

When Proviſions, or other Commodities are ſold by the bulk, the Sale is perfect at the ſame time that the parties are agreed about the Goods, and the Price, as in the Sale of other things; becauſe it is known preciſely what is ſold. But if the Price is regulated at the rate of ſo much for every Piece, for every Pound, and for every Meaſure; the Sale is not perfect but as to ſo much as is counted, weighed, meaſured [g]. For the delay to count, weigh, and meaſure, is as it were a condition which ſuſpends the Sale, till it be known by that what is ſold.

[g] Si omne vinum, vel oleum, vel frumentum, vel argentum quantumcunque eſſet, uno pretio venierit, idem juris eſt, quod in cæteris rebus. Quod ſi vinum ita venierit, ut in ſingulas amphoras: item oleum, ut in ſingulos metretas: item frumentum, ut in ſingulos modios: item argentum, ut in ſingulas libras, certum pretium diceretur: quæritur quando videatur emptio perfici: Quod ſimiliter ſcilicet quæritur & de his quæ numero conſtant: ſi pro numero corporum, pretium fuerit ſtatutum. Sabinus & Caſſius tunc perfici emptionem exiſtimant, cùm adnumerata, admenſa adpenſave ſint. *l.* 35. §. 5. *ff. de contr. empt.* See the fifth Article of the ſeventh Section.

VIII.

8. *Sale upon tryal.*

The things which the Buyer reſerves for ſight and tryal, altho' the Price be agreed on, are not ſold till after the Buyer is ſatisfied with the tryal, which is a kind of Condition, on which the Sale depends [h]. But if the Sale is already accompliſhed under this Reſervation, that if the Buyer is not content with the thing ſold within a certain time, the Sale ſhall be diſſolved; it will be a condition the event of which will annul the Sale, which in the mean while is held to ſubſiſt [i].

[h] Alia cauſa eſt deguſtandi, alia metiendi, guſtus enim ad hoc proficit ut improbare liceat. *l.* 34. §. 5. *ff. de contr. empt.*

[i] Si res ita diſtracta ſit, ut ſi diſpliciuiſſet, inempta eſſet, conſtat non eſſe ſub conditione diſtractam, ſed reſolvi emptionem ſub conditione. *l.* 3. *ff. de contr. empt.* Si quid ita venierit, ut niſi placuerit, inter præfinitum tempus redhibeatur: ea conventio rata habetur. *l.* 31. §. 22. *ff. de ædil. ed.* See the thirty-eighth Article of the eleventh Section.

IX. What-

IX.

Acceſſories of a thing ſold are included in the Sale.

Whatever makes a part of the thing ſold, or is an acceſſory to it, is included in the Sale, unleſs it be reſerved. Thus, the Trees which are in a Ground, the hanging Fruits, the Vine-props which are in a Vineyard, the Keys of a Houſe, the Pipes which convey water to it, the Services, and whatever is fixed to the Houſe with a deſign that it ſhould remain there for ever, and the Acceſſories of this kind, make a part of that which is ſold, and belong to the Purchaſer[l].

[l] Fructus pendentes pars fundi videntur. *l.* 44. *ff. de rei vind.* Fructus emptori cedere. *l* 13. §. 10. *ff. de act. empt. & vend.* Ædibus diſtractis, ea eſſe ædium ſolemus dicere quæ quaſi pars ædium, vel propter ædes habentur. *d. l.* 13. §. *ult.* Pali qui vineæ cauſa parati ſunt, antequam collocentur, fundi non ſunt. Sed qui exempti ſunt, hac mente, ut collocentur, fundi ſunt. *l.* 17. *in fine ff. de act. empt. & vend.* Labeo generaliter ſcribit, ea quæ perpetui uſus cauſâ in ædificiis ſunt, ædificii eſſe. *d. l.* 17. §. 7.

See upon this and the following Article, the eighth Article of the firſt Section of the Title of things.

X.

10. Things ſeparate from the Edifice which are included in the Sale.

Things which are not fixed to the Edifice, but whoſe uſe is an Acceſſory to it, as the Rope, and Buckets belonging to a Well; the Cocks of a Fountain, its Vaſe, and other things of the ſame kind; and likewiſe thoſe things which have been ſeparated from the Edifice with intention to fix them to it again, are Acceſſories, and are included in the Sale; but not ſuch things as were intended to be fixed to it, and never were actually fixed. And in order to make a particular judgment of the caſes in which all theſe ſorts of Acceſſories enter into the Sale, or do not enter; it is neceſſary to conſider the circumſtances of the uſe of thoſe things, of their deſtination to that Uſe, of the place where they are at the time of the Sale, of the condition of the Places that are ſold, and above all that of the Intention of the Contracters, thereby to diſcover what they intended ſhould be comprehended in the Sale, and what not [m].

[m] Caſtella plumbea, putea, opercula puteorum, epitonia fiſtulis applumbata: aut quæ terra continentur, quamvis non ſint affixa, ædium eſſe conſtat. *l.* 17. §. 8. *ff. de act. empt. & vend.*

Ea quæ ex ædificio detracta ſunt, ut reponantur, ædificii ſunt: at quæ parata ſunt ut imponantur, non ſunt ædificii. *d. l.* §. 10. Semper in ſtipulationibus, & in cæteris contractibus id ſequimur, quod actum eſt. *l.* 34 *ff. de reg. jur.* Quod factum eſt cùm in obſcuro ſit, ex affectione cujuſque capit interpretationem. *l.* 168. §. 1. *eod.* See the eighth Article of the ſecond Section of Covenants.

XI.

11. Acceſſories of Moveables.

The Acceſſories of Moveables, which may be ſeparated from them, are included in the Sale, or are not included, according to the circumſtances. Thus, a Horſe being expoſed to Sale without his Harneſs, the Buyer will only have the bare Horſe; and if he is offered to ſale with his Harneſs on, the Buyer will have all, unleſs in both caſes it has been otherwiſe agreed on [n].

[n] Uti quæ optimè ornata vendendi cauſâ fuerint (jumenta) ita emptoribus tradentur. *l.* 38. *ff. de ad. ed.*

Vendendi autem cauſâ ornatum jumentum videri Cælius ait, non ſi ſub tempus venditionis, hoc eſt biduo ante venditionem ornatum ſit: ſed ſi in ipſâ venditione ornatum ſit. Aut ideò inquit venale cùm eſſet, ſic ornatum inſpiceretur. *d. l.* 38. §. 11.

XII.

12. In the Sale of one of two things, the choice belongs to the Seller.

If a Sale is made of one or other of two things, as of one of two Horſes, without mentioning whether the choice ſhall belong to the Seller, or Buyer, the Seller may give which of the two he pleaſes [o]. For he is in the place of a Debtor, and conſequently may give that which is of leaſt value [p].

[o] Si emptio ita facta fuerit, eſt mihi emptus Stichus, aut Pamphilus: in poteſtate eſt venditoris, quem velit dare, ſicut in ſtipulationibus. *l.* 34. §. 6. *ff. de contr. empt.*

[p] *See the fifteenth Article of the ſecond Section of the Title of Covenants; and the ſeventh Article of the ſeventh Section of this Title.*

XIII.

13. Sale of a thing belonging to another perſon.

Since it often happens that the Poſſeſſors are not the right Owners of what they poſſeſs; and that likewiſe the Purchaſers may not know whether the Sellers are, or are not, the true Owners of the things which they ſell; it is natural that one ſhould have power to ſell a thing of which he is not Maſter; and the Sale ſubſiſts till the true Owner makes his right appear, and diſſolves the Sale [q].

[q] Rem alienam diſtrahere quem poſſe nulla dubitatio eſt: nam emptio eſt & venditio, ſed res emptori auferri poteſt. *l.* 28. *ff. de contr. empt.*

SECT. V.

Of the PRICE.

The CONTENTS.

1. *The Price of the Sale can be nothing elſe but Money.*
2. *If inſtead of the Price agreed on, the Seller*

Seller receives another thing in Payment.

3. *One or more Prices of one and the ſame Sale.*

4. *Price uncertain, and unknown.*

5. *The Price of Sales is arbitrary.*

I.

1. *The Price of the Sale can be nothing elſe but Money.*

THE Price of the Sale can never be any other thing than Current Money, which makes the Eſtimate of the thing ſold; and if for the Price any other thing is given, or any work done; it will be either an Exchange, or ſome other Contract, but not a Sale [a].

[a] Emptionem rebus fieri non poſſe pridem placuit. *l. pen. C. de rer. perm.*

Pretium in numerata pecunia conſiſtere debet. §. 2. *inſt. de empt. & vend.*

II.

2. *If inſtead of the Price agreed on, the Seller receives another thing in payment.*

Altho' a Sale cannot be made but by fixing the Price in Current Money, yet the Contracters may by the ſame Contract agree to give in payment of the Price of the Sale, either Moveables, or Debts, or other Effects. And in this caſe there are as it were two Sales, which it is neceſſary to diſtinguiſh. The firſt is, where the Price is not paid in ready Money; and the ſecond, is that in which he who owes the Price, is as it were the Seller of that which he gives to diſcharge himſelf of the Price [b]. But altho' there are two Sales in effect which are tranſacted between the ſame perſons; yet to avoid the multiplicity of acts, they are conſidered as one only act, in which the two Sales are confounded, the ſecond Sale being eclipſed under the firſt. Thus, by contracting the Ideas which diſtinguiſh theſe Sales, the two are taken for one alone [c]. Becauſe it happens that the ſame Sum of Money makes the Price of both Sales, and that each Buyer diſcharges himſelf of the Price of that which is ſold to him without giving Money, by giving, in lieu of the Price, the thing which he ſells on his part.

[b] *This is a conſequence of the preceding Article.*

[c] Nam celeritate conjungendarum inter ſe actionum, unam actionem occultari. *l.* 3. §. 12. *ff. de donat. inter vir. & ux.*

There happens often ſuch like occaſions of confounding two acts into one, even among divers Contracters. Thus, for example, if any perſon having a mind to give to another a Sum of Money, orders the Money to be carried to him by a third perſon, who is his Debtor; the ſame act of the delivery of the Money which this Debtor makes to the Donee, will conſummate both the Deed of Gift, and the Payment of the Debt. V. d. §. 12.

III.

3. *One or more Prices of one and the ſame Sale.*

There is only one Price of the Sale, when one thing alone is bought, or many things by the bulk. But when things are bought by Number, Weight, or Meaſure, each Piece, each Pound, each Buſhel hath its price, according to the agreement [d].

[d] *See the ſixth Article of the fourth Section, and the Law which is there quoted.*

IV.

4. *Price uncertain, and unknown.*

The Price of the Sale is almoſt always certain and known; but it may happen that it may be uncertain and unknown: as if it is referred to a third perſon to adjuſt the Price, or if the Buyer gives for the Price, the Money which he ſhall make of ſuch a buſineſs. In theſe and ſuch like caſes, the Price will not be certain and known, but by the Eſtimation, or other Event, which ſhall fix it [e].

[e] Certum eſſe pretium debet. Alioqui, ſi inter aliquos ita convenerit, ut quanti Titius rem æſtimaverit, tanti ſit empta —— ſiquidem ille qui nominatus eſt, pretium definierit, tunc omni modo ſecundùm ejus æſtimationem & pretium perſolvatur, & res tradatur. §. 1. *inſtit. de empt. & vend. l. ult. C. de contr. empt.* Hujuſmodi emptio, quanti tu eum emiſti, quantum pretii in arca habeo, valet. Nec enim incertum eſt pretium tam evidenti venditione. Magis enim ignoratur, quanti emptus ſit, quam in rei veritate incertum eſt. *l.* 7. §. 1. *ff. de contr. empt. v. l.* 7. §. 1. & §. *ult. ff. de contr. empt.* See the eleventh Article of the third Section of Covenants.

V.

5. *The Price of Sales is arbitrary.*

There are ſome Commodities of which the Price may be regulated for the Publick Good; as it is, for example, in Bread, and other things in ſome Countries. But ſetting aſide theſe Regulations, the Price of things is undetermined. And ſince it ought to be differently regulated according to the different qualities of the things, and according to the plenty or ſcarcity both of Money, and of the Commodities, the eaſineſs or difficulty of the Carriage, and the other cauſes which increaſe or diminiſh the value; this uncertainty of the Price makes an extent of more and of leſs, which requires that the Seller and Buyer ſhould adjuſt between themſelves the Price of the Sale. And the injuſtices in the Price are not reſtrained, except in ſo far as has been remarked in the beginning of the third Section [f].

[f] Cura carnis omnis ut juſto pretio præbeatur, ad curam præfecturæ pertinet. *l.* 1. §. 11. *ff. de off. præf. urbi.*

Hoc ſolum quod paulo minore pretio, fundum venditum ſignificas, ad reſcindendam venditionem invalidum eſt. *l.* 8. *C. de reſc. vend.*

SECT. VI.

Of CONDITIONS, and other Pacts, in a Contract of Sale.

The CONTENTS.

1. *We may add to the Contract of Sale what Pactions we will.*
2. *Effect of the condition on which the Sale depends.*
3. *Effect of the Condition which diſſolves the Sale.*
4. *The Earneſt hath its effect according to agreement.*
5. *The effect of the Earneſt, when there is nothing ſaid of it in the Contract.*

Clauſe of Nullity.
Power of Redemption.

I.

1. *We may add to the Contract of Sale what Pactions we will.*

WE may add to the Contract of Sale, as well as to all other Contracts, all manner of Covenants, and Pactions that are lawful. Such as Conditions, Clauſes of Nullity, a Power of Redemption, and others [a].

[a] *See the ſecond Article of the ſecond Section, and the firſt Article of the fourth Section of the Title of Covenants.*

Of CONDITIONS.

THE Rules touching Conditions in Sales, are the ſame with thoſe which have been explained in the fourth Section of the Title of Covenants [b], to which we need only add the following Rules.

[b] *See the ſixth Article, together with thoſe that follow, of the fourth Section of the Title of Covenants.*

II.

2. *Effect of the condition on which the Sale depends.*

In the Sales whoſe accompliſhment depends on the event of a Condition, all things remain in the ſame ſtate, as if there had been no Sale, until the Condition comes to paſs. Thus, the Seller remains Maſter of the thing, and the Fruits are his. But the Condition being fulfilled, the Sale is perfected, and hath the effects which it ought to produce [c].

[c] Conditionales venditiones, tunc perficiuntur, cum impleta fuerit conditio. *l. 7. ff. de contr. empt.* Fructus medii temporis venditoris ſunt. *l. 8. ff. de per. & com.*

III.

3. *Effect of the Condition which diſſolves the Sale.*

In Sales which are accompliſhed, and which may be diſſolved by the event of a condition, the Buyer remains Maſter until that event. And in the mean while he poſſeſſes, enjoys, and makes the Fruits his own; and he preſcribes likewiſe, but his Preſcription is of no prejudice to the Right of the perſon who is to become Maſter by the event of the Condition [d].

[d] Si hoc actum eſt, ut meliore allata conditione diſcedatur, erit pura emptio quæ ſub conditione reſolvitur. *l. 2. ff. de in diem add.* Ubi igitur ſecundùm quod diſtinximus pura venditio eſt, Julianus ſcribit, hunc, cui res in diem addicta eſt, & uſucapere poſſe, & fructus, & acceſſiones lucrari. *d. l.* §. 1.

Of EARNEST.

IV.

4. *The Earneſt hath its effect according to agreement.*

THE Earneſt Penny is at it were a Pledge which the Buyer gives to the Seller in Money, or ſome other thing; whether it be to ſignify more certainly that the Sale is perfected [e]: or to be in place of payment of a part of the Price: or to regulate the Damages to be recovered of the Party who ſhall fail to perform the articles of the Sale. Thus the Earneſt given in the Sale has the effect which the parties have agreed it ſhould have.

[e] Quod ſæpe arrhæ nomine pro emptione datur non eo pertinet, quaſi ſine arrha conventio nihil proficiat: ſed ut evidentiùs probari poſſit convenſſe de pretio. *l. 35. ff. de contr. empt.* Quod arrhæ nomine datur argumentum eſt emptionis & venditionis contractæ. *inſt. de empt. & vend.* See the following Article.

V.

5. *The effect of the Earneſt, when there is nothing ſaid of it in the Contract.*

If there be no expreſs agreement which regulates the effect which the Earneſt ſhall have, againſt the party who ſhall fail in performing the Contract of Sale; if it is the Buyer, he ſhall loſe his Earneſt. And if it is the Seller, he ſhall give back the Earneſt, with as much more [f].

[f] Is qui recuſat adimplere contractum, ſi quidem eſt emptor, perdit quod dedit: ſi verò venditor, duplum reſtituere compellitur: licet ſuper arrhis nihil expreſſum eſt. *inſt. de empt. & vend.* In poſterum ſi quæ arrhæ ſuper facienda emptione cujuſcunque rei datæ ſunt, ſive in ſcriptis, ſive ſine ſcriptis, licet non ſit ſpecialiter adjectum, quid ſuper iiſdem arrhis non procedente contractu fieri oporteat: ramen & qui vendere pollicitus eſt, venditionem recuſans, in duplum eas reddere cogatur: & qui emere pactus eſt, ab emptione recedens, datis à ſe arrhis cadat, repetitione earum deneganda. *l. 17. in f. C. de fid. inſtr.*

Of the Clauſe of NULLITY in caſe of Non-Payment.

Clauſe of Nullity.

IT is an uſual Agreement made in Contracts of Sale, that if the Buyer does not pay the Price at the time appointed,

pointed, the Sale ſhall be void. And ſince this Agreement makes a part of the matter of the Diſſolution of Sales, it ſhall be explained in the twelfth Section.

Of the Power of REDEMPTION.

Power of Redemption.

THE Power of Redemption is an Agreement, by which the Seller is at liberty to take back the thing, he reſtoring the Price. And this is another way of diſſolving the Sale, which ſhall be explained in the ſame place.

SECT. VII.

Of the changes of the thing ſold; and how the Loſs, or Gain accruing thereby belongs to the Seller, or to the Buyer.

Change of the thing ſold.

IT often happens that before the Sale is intirely conſummated, ſeveral events change the ſtate of the thing ſold; make it better, or worſe, augment or diminiſh it; and even that the thing periſhes, either thro' its own nature, or by ſome caſualty. And ſince theſe changes occaſion Profit, or Loſs, which regards differently either the Seller, or Buyer; proviſion is made for adjuſting that matter by the Rules which follow.

The CONTENTS.

1. *The changes before the accompliſhment of the Sale, regard the Seller.*
2. *The changes after the Sale regard the Buyer.*
3. *The changes which happen after the Seller is in delay for not delivering the thing, are at his peril.*
4. *If both are in delay.*
5. *Of things ſold by Number, Weight, or Meaſure.*
6. *Sale upon trial.*
7. *If in the Sale of one of two things, the one happens to periſh.*
8. *If the thing periſhes before the event of the condition which ought to accompliſh the Sale.*
9. *If in the ſame caſe the thing is diminiſhed, or becomes better.*
10. *It does not depend on the perſon who ought to perform a condition, to take advantage by his not performing it.*
11. *Loſs occaſioned by the fault of one of the Contracters.*
12. *The Fruits belong always to him who is Maſter at the time they are gathered.*
13. *If the parties have regulated by agreement, on whom the loſs ſhall fall, they muſt hold to that.*
14. *What is to be conſidered, in order to judge who ought to bear the loſs, and reap the profit.*

I.

ALL the changes which happen before the Sale is accompliſhed, regard the Seller, becauſe the thing is ſtill his, and the Buyer has no right to it. And as the Seller is at liberty not to finiſh and perfect the Sale, if the thing happens to be better, ſo likewiſe the Buyer has the ſame liberty, if there happens a change which makes it worſe [a].

1. *The changes before the accompliſhment of the Sale, regard the Seller.*

[a] Donec enim aliquid deeſt ex his, & pœnitentiæ locus eſt, & poteſt emptor, vel venditor, ſine pœna, recedere ab emptione, & venditione. *inſt. de empt. & vend.*

II.

All the changes which happen after the Sale is accompliſhed, regard the Buyer. And if the thing periſhes before the delivery, he bears the loſs, and is nevertheleſs bound to pay the Price. And he reaps the profit likewiſe of all the changes, which make the thing better [b]. For after the Sale, the thing is look'd upon to be his, and the Seller keeps poſſeſſion of it only with the Buyer's conſent, and with deſign to reſtore it to him.

2. *The changes after the Sale, regard the Buyer.*

[b] Periculum rei venditæ ſtatim ad emptorem pertinet, tametſi adhuc ea res emptori tradita non ſit. §. 3. *inſt. de empt. & vend.* Cui neceſſe eſt, licet rem non fuerit nactus, pretium ſolvere. *d.* §. 3. Poſt perfectam venditionem, omne commodum & incommodum, quod rei venditæ contingit, ad emptorem pertinet. *l.* 1. *C. de per. & com.* Id quod, poſt emptionem fundo acceſſit per alluvionem, vel periit, ad emptoris commodum, incommodumque pertinet. *l.* 7. *ff. eod.* See the following Article.

Altho' the Buyer is not properly made Maſter of the thing till after the Delivery, he does nevertheleſs bear the loſſes which happen between the Sale and the Delivery. For the Contract being finiſhed, it has this effect, that the Buyer may force the Seller to deliver the thing ſold, and that the Seller poſſeſſes it only precariouſly, being under a neceſſity of delivering it up to the Buyer. See the ſecond Article of the firſt Section, and the tenth Article of the ſecond Section.

III.

If the changes which diminiſh the thing ſold, or which deſtroy it, between the time of Sale and the Delivery, happen

3. *The changes which happen after*

the Seller is in delay for not delivering the thing, are at his peril.

pen after the Seller is in fault for not delivering it, he bears the loſs, altho' the changes ſhould happen without any fault of his, and even by pure chance [c]. And he loſes both the Thing, and the Price, which he ought to reſtore, if he had received it. For if the thing had been delivered, the Buyer might have either ſold it, or prevented the loſs ſome other way; and in a word, the Seller ought to blame himſelf for his delay, in not delivering it in due time.

[c] Lectos emptos Ædilis, cùm in via publica poſiti eſſent, concidit——— ſi neque traditi eſſent, neque emptor in mora fuiſſet, quominus traderentur, venditoris periculum erit. *l.* 12. & 14. *ff. de per. & com. v. l. ult. C. eod.*

Si ſervus petitus, vel animal aliud demortuum ſit ſine dolo malo, & culpa poſſeſſoris, pretium non eſſe præſtandum plerique aiunt. Sed eſt verius, ſi fortè diſtracturus erat petitor, ſi accepiſſet, moram paſſo debere præſtari: nam ſi ei reſtituiſſet, diſtraxiſſet, & pretium eſſet lucratus. *l.* 15. §. *ult. ff. de rei vindic.*

See the tenth Article of the third Section of a *Depoſitum*, and the ſecond Article of the fourth Section of the Title of Damages occaſioned by faults.

IV.

4. If both are in delay.

If the delivery of the thing being delay'd by the fault both of the Seller and Buyer, there happens a change which leſſens the thing ſold, or which deſtroys it altogether; the Buyer cannot charge the Seller with delay, ſince he himſelf being in delay, either by reaſon of his abſence, or becauſe of ſome other hindrance, or even thro' his negligence, he cannot ſay that the Seller ought to have delivered the thing to him. But if the Seller having been in delay, offers afterwards to deliver the thing, matters being ſtill entire, and the Buyer delays to receive it; or if, on the contrary, the Buyer having been in delay, and afterwards uſing his diligence, the Seller does not deliver the thing; the changes which have happened during the laſt delay, will fall upon him who has been laſt in fault for the thing's not being delivered [d].

[d] Si & per emptorem, & venditorem mora fuiſſet, quominus vinum præberetur, & traderetur, perinde eſſe ait, quaſi ſi per emptorem ſolum ſtetiſſet: non enim poteſt videri mora per venditorem emptori facta eſſe, ipſo moram faciente emptore. *l.* 51. *ff. de act. empt. & vend.* Poſteriorem moram venditori nocere. Quod ſi per venditorem, & emptorem mora fuerit, Labeo quidem ſcribit emptori potius nocere, quàm venditori moram adhibitam. Sed videndum eſt, ne poſterior mora damnoſa ei ſit. Quid enim, ſi interpellavero venditorem, & non dederit, id quod emeram: deinde, poſteriore offerente illo, ego non acceperim? Sanè hoc caſu nocere mihi deberet. Sed ſi per emptorem mora fuiſſet, deinde cùm omnia in integro eſſent, venditor moram adhibuerit, cùm poſſet ſe exolvere, æquum eſt, poſteriorem moram venditori nocere. *l.* 17. *ff. de per. & comm. r. v.*

V.

5. Of things ſold by Number, Weight, or Meaſure.

In the Sales of things which are ſold by Number, Weight, or Meaſure, all the diminutions, and all the loſſes which happen before the things are counted, weighed, or meaſured, fall upon the Seller; for until then, there is no Sale. And the changes which happen afterwards regard the Buyer [e].

[e] Priuſquam admetiatur vinum, prope quaſi nondum venit. Poſt menſuram factam, venditoris deſinit eſſe periculum. *l.* 1. §. 1. *ff. de per. & com.*

See the ſeventh Article of the fourth Section.

VI.

6. Sale upon trial.

If a thing is ſold upon trial for a certain time, on condition that it ſhall not be ſold, but in caſe it pleaſes the Buyer; all the changes, and the profit or loſs which happen before, or during the time of trial, the Sale not being as yet accompliſhed, will accrue to the Seller, who is ſtill the Maſter [f].

[f] Si mulas tibi dedero, ut experiaris: & ſi placuiſſent emeres, ſi diſplicuiſſent, ut in dies ſingulos aliquid præſtares, deinde mulæ à graſſatoribus fuerint ablatæ, intrà dies experimenti, quid eſſet præſtandum? Utrùm pretium & merces, an merces tantùm? Et ait Mela, intereſſe utrùm emptio jam erat contracta, an futura, ut ſi facta, pretium petatur, ſi futura, merces petatur. *l.* 20. §. 1. *ff. de præſc. verb. d. l. in princ.* Si quem quæſtum fecit is qui experiendum quid accepit, veluti ſi jumenta fuerint, eaque locata ſint, idipſum præſtabit ei qui experiendum dedit. Neque enim ante eam rem quæſtui cuique eſſe oportet, priuſquàm periculo ejus ſit. *l.* 13. §. 1. *ff. commod.*

VII.

7. If in the Sale of one of two things, the one happens to periſh.

If of two things one is ſold, whether the choice be left to the Seller, or Buyer, and after the Sale one of the two periſhes, during the delay regulated for the choice; the Seller is bound to give the other, altho' it ſhould happen to be the beſt; for he owes one of the two. And if both periſh, the Buyer owes nevertheleſs the Price; for had it not been for this Engagement, the Seller might have rid himſelf of both the things; and that which the Buyer was to have had, is loſt to him [g].

[g] Si emptio ita facta fuerit, eſt mihi emptus Stychus aut Pamphilus; in poteſtate eſt venditoris quem velit dare, ſicut in ſtipulationibus: ſed uno mortuo, qui ſupereſt, dandus eſt. Et ideo prioris periculum, ad venditorem, poſterioris ad emptorem reſpicit. Sed & ſi pariter deceſſerunt, pretium debebitur: unus enim utique periculo emptoris vixit. Idem dicendum eſt etiam ſi emptoris fuit arbitrium, quem vellet habere. *l.* 34. §. 6. *ff. de contr. empt.*

VIII.

8. *If the thing perishes before the event of the condition which ought to accomplish the Sale.*

In the Sales of which the accomplishment depends on a condition, if the thing sold perishes before the event of the condition, the loss shall be the Seller's, although the condition should come to pass afterwards. For he was still the Master of it, and the thing being destroyed, it cannot any more be sold. And in fine, it was understood by the Contracters, that that was only sold which should be in being at the time that the condition should come to pass [h].

[h] Si ante nuptias mancipia æstimata deperierint: an mulieris damnum sit? Et hoc consequens est dicere. Nam cùm sit conditionalis venditio, pendente autem conditione mors contingens extinguat venditionem, consequens est dicere mulieri perisse, quia nondum erat impleta venditio. *l.* 10. §. 5. *ff. de jur. dot.*

IX.

9. *If in the same case the thing is diminished, or becomes better.*

If in the same case the thing is not destroyed, but diminished; and the condition comes to pass, which accomplishes the Sale; the loss shall fall upon the Buyer [i]. For the Seller has been obliged to keep the thing for him, until the event of the condition. And seeing this event makes the Buyer Master of the thing, he ought to bear this loss in the same manner as he would have reaped the benefit of the changes, which would have made the thing better [k].

[i] Si extet res (vendita sub conditione) licèt deterior effecta, potest dici esse damnum emptoris. *l.* 8. *ff. de per. & com. r. v.*

[k] Secundùm naturam est commoda cujusque rei, eum sequi, quem sequuntur incommoda. *l.* 10. *ff. de reg. jur.*

X.

10. *It does not depend on the person who ought to perform a condition, to take advantage by his not performing it.*

When a condition is put in favour of one of the Contracters, or that it may turn to his advantage, if this condition depends on the deed of the other party, either in part or in whole, the person who ought to fulfil the condition is not at liberty to fail in the performance of this Engagement, that he may take advantage therefrom to the prejudice of the Party whose interest it is that the condition be fulfilled. Thus, for example, if in a Sale made on condition that the thing should be delivered on a certain day, and in a certain place, it happens in the mean while that the thing increases in price, it does not depend on the Seller to annul the Sale, and to keep that which he had sold, by failing to deliver it on the day, and at the place appointed, that he may make advantage of this change; for it was the Buyer's interest that this condition should be fulfilled. And if, on the contrary, the thing diminishes in price, it does not depend on the Buyer to hinder the effect of the Sale, by absenting himself at the time, and from the place where the delivery was to be made; because it was the Seller's interest that the Goods should be delivered. Thus, in a Sale made on condition that if the Buyer does not pay at the time fixed, the Sale shall be void; if it happen in the mean while that the thing diminishes in its price, it does not depend on the Buyer to annul the Sale by failing to make payment, that he may thereby avoid taking the thing, and bearing the loss: For this condition was in favour of the Seller, and not of the Buyer [m].

[m] Quod favore quorundam constitutum est, quibusdam casibus ad læsionem eorum nolumus inventum videri. *l.* 6. *C. de legib.*

Nam legem commissoriam, quæ in venditionibus adjicitur, si volet venditor exercebit, non etiam invitus. *l.* 3. *ff. de leg. commiss.* See the nineteenth Article of the fourth Section of Covenants.

XI.

11. *Loss occasioned by the fault of one of the Contracters.*

In all sorts of cases, where the thing sold perishes, or becomes worse by the fault of the Seller, or Buyer, he whose fault has occasioned the loss, ought to bear it, and to blame himself for it [n].

[n] Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire. *l.* 203. *ff. de reg. jur.*

XII.

12. *The Fruits belong always to him who is Master at the time they are gathered.*

We must not reckon among the changes which happen to things sold under condition, the Fruits and Revenues which they may produce. For they belong always to the person who is Master of the thing at the time they are gathered, although it happen that by the event of the condition he is no longer Master of it. Thus in the Sales of which the accomplishment depends on a condition, the Fruits do in the mean while belong to the Seller; altho' if the condition happens which ought to accomplish the Sale, the Loss and the Gain, which may fall out in the mean while by the changes of the thing sold, belong to the Buyer. And in the Sales which are perfected, and which may be annulled, by the event of a Condition, the Fruits in the mean while belong to the Buyer; altho' if the condition happens which dissolves the Sale, the Loss and Gain which may accrue from the changes of the thing sold, regard the Seller [o]. Because in all these cases, the changes that happen to the thing regard the

the perſon who is to be Maſter of it, and he ought to have it in the condition in which it is; but the Fruits and other Revenues which fell due before the event of the Condition, having been ſeparated from the thing ſold, they remain with him who was at that time Maſter of the thing.

[o] Si quidem hoc actum eſt ut meliore allata conditione, diſcedatur; erit pura emptio, quæ ſub conditione reſolvitur. Sin autem hoc actum eſt, ut perficiatur emptio, niſi melior conditio offeratur, erit emptio conditionalis. Ubi igitur ſecundum quod diſtinximus pura venditio eſt, Julianus ſcribit, hunc cui res in diem addicta eſt, & uſucapere poſſe, & fructus, & acceſſiones lucrari. *l.* 2. *ff. de in diem add.* Ubi autem conditionalis venditio eſt, negat Pomponius uſucapere eum poſſe, nec fructus ad eum pertinere. *l.* 4. *eod. See the text of the twentieth Law,* §. 1. ff. de præſcr. verb. *already quoted on the ſixth Article of this Section.*

XIII.

13. If the parties have regulated by agreement, on whom the Loſs ſhall fall, they muſt hold to that.

If there is any Agreement in the Contract of Sale which derogates from the preceding Rules, and which obliges either the Seller, or Buyer, to bear the loſs which naturally did not belong to him; they muſt ſtick to the Agreement[p]. For every one may renounce what is for his own advantage[q].

p Si venditor ſe periculo ſubjecit, in id tempus periculum ſuſtinebit, quoad ſe ſubjecit. *l.* 1. *ff. de per. & com.* Si in venditione conditionali, hoc ipſum conveniſſet, ut res periculo emptoris ſervaretur, puto pactum valere. *l.* 10. *eod.*

[q] Omnes licentiam habent, his quæ pro ſe introducta ſunt, renuntiare. *l.* 29. *C. de pact. l.* 41. *ff. de min.* See the fourth Article of the fourth Section of Covenants.

XIV.

14. What is to be conſidered, in order to judge who ought to bear the loſs, and reap the profit.

It follows from all theſe Rules concerning the changes that happen to the thing ſold, that in order to judge who ought to bear the Loſs, or reap the Profit, it is neceſſary to conſider what the thing is which is ſold, and what enters into the Sale: if the Sale be perfected, or not: if it is pure and ſimple, or conditional: if the Sale being once accompliſhed, it is afterwards diſſolved: if there is any delay in the delivery: if any Fault has given occaſion to the change: and the other circumſtances, in order to know by the ſtate of things, who was the Maſter at the time of the change, or who, without being Maſter, ought to bear the Loſs, or reap the Profit[r].

[r] Neceſſariò ſciendum eſt, quando perfecta ſit emptio, tunc enim ſciemus cujus periculum ſit. Nam perfecta emptione periculum ad emptorem reſpiciet; & ſi id quod venierit appareat quid, quale, quantum ſit, ſit & pretium, & purè venit, &c. *l.* 8. *ff. de per. & com.* See the eleventh Article of the firſt Section of the Loan of Money.

SECT. VIII.

Of Sales that are null.

What Sales are Null.

BY Sales that are null is meant thoſe which never did ſubſiſt; whether it be becauſe of the Incapacity of one of the Contracters; or becauſe the thing ſold is not Vendible, or thro' ſome Vice in the Sale, as if it be contrary to Law and Good Manners: or thro' ſome defect, as if the Sale ought not to take place, but upon the exiſtence of a Condition which does not happen.

All the Cauſes which annul Covenants in general, do likewiſe annul Sales, purſuant to the Rules which have been explained in the fifth Section of the Title of Covenants; and it will be ſufficient here to take notice of the Rules that are peculiar to Nullities in Sales.

[*In* England, *no Manors, Lands, Tenements, or other Hereditaments, can paſs, alter or change, from one to another, whereby any ſtate of Inheritance or Freehold ſhall be made, by Bargain and Sale, unleſs it be by Writing indented, ſealed and inrolled in one of the King's Courts of Record at* Weſtminſter. Stat. 27. Hen. 8. cap. 16.]

Of Perſons who can neither ſell nor buy.

IT was forbid by the *Roman* Law, to thoſe who were in any publick Office, to purchaſe in the places where they exerciſed their Juriſdiction, either Lands, or even Moveables, during the time of their Adminiſtration, without expreſs leave to do it; except it was in what they conſumed for Diet and Cloathing. And the ſame Prohibitions extended likewiſe to their Domeſticks[a]. But in *France*, Offices being perpetual, the Officers may purchaſe of any perſons that are willing to ſell; and ſuch like Prohibitions with reſpect to them are limited to the Purchaſes of Eſtates, or Rights, litigated in the Courts of which they are Judges, and to other Acquiſitions which they may have extorted by Concuſſion, or any other Miſdemeanor[b].

[a] *L. un. Cod. de contract. Jud. d. l.* §. 2. *&* 3. *l.* 46. *l.* 62. *ff. de contra. empt. l.* 46. §. 2. *de jure fiſci.*

[b] *By the Ordinances of St.* Lewis *in* 1254, *of* Philip *the Fair in* 1320, *and of* Charles VI. *in* 1388. *it is prohibited to all Bailiffs and Seneſchals to purchaſe Immoveables, during the time of their Adminiſtration.*

By many Ordinances, it is prohibited to Officers, and Perſons of great Power and Authority, or who have any privilege of having their Cauſes tried only before certain Judges, to accept of Sales, or Aſſignments of Rights,

in order to carry the Parties from one Tribunal to another. And all Judges, Advocates and Proctors are likewiſe forbid to accept of Sales, or Aſſignments of litigious Rights. See the Ordinances of Charles V. *in* 1356, *of* Francis I. *in* 1535. *Ch.* 12. *Art.* 23. *of* Orleans, *Art.* 54. *of* Lewis XII. *in* 1498. *Art.* 3. *and in* 1510. *Art.* 17. See likewiſe the ſecond Article of the third Section of Payments, and the Remark that is there made.

It is likewiſe proper to take notice here of the Prohibitions in the Ordinance of Orleans, *Art.* 109. *to Gentlemen, and Officers of Juſtice, to deal in Merchandizing, and to take Farms, either in their own Names, or in the Names of others for their behoof, under penalty to the Gentlemen, of forfeiting their Nobility; and to the Officers of Juſtice, of loſing their Places.*

See the fourth Article of the ſecond Section of the Vices of Covenants.

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I.

1. Tutors and Guardians cannot buy the Goods of thoſe who are committed to their care.

TUtors, Guardians, and other Adminiſtrators, can purchaſe nothing of the Goods of Minors, and other Perſons who are under their charge; neither directly in their own Names, nor by the interpoſition of other Perſons [a].

[a] Tutor rem pupilli emere non poteſt. Idemque porrigendum eſt ad ſimilia, id eſt, ad curatores, &c. *l.* 34. §. *ult. ff. de contr. empt.* Si (tutor) per interpoſitam perſonam, rem pupilli emerit, in ea cauſa eſt, ut emptio nullius momenti ſit, quia non bona fide videretur rem geſſiſſe. *l.* 5. §. 3. *ff. de auth. & conſ. tut.* Si filius tutoris vel quæ alia perſona juri ejus ſubjecta, emerit, idem erit atque ſi ipſe emiſſet. *d. l.* §. *ult.*

II.

2. Factors are under the ſame incapacity.

Factors, and thoſe who are entruſted with the Care of the Affairs of others, cannot purchaſe the Goods of thoſe whoſe affairs are committed to their management [b], unleſs they purchaſe them of the Owners themſelves.

[b] Idemque porrigendum eſt ad ſimilia, id eſt ad curatores procuratores, & qui negotia aliena gerunt. *d. l.* 34. §. *ult. ff. de contr. empt.*

III.

3. The Heir burdened with a Subſtitution.

The Heir or Executor who is burdened with a Subſtitution, cannot ſell the Eſtate which he poſſeſſes only on condition to reſtore it [c].

[c] Sancimus ſive lex alienationem inhibuerit, ſive teſtator hoc fecerit, ſive pactio contrahentium hoc admiſerit, non ſolum dominii alienationem, vel mancipiorum manumiſſionem eſſe prohibendam: ſed, &c. *l.* 7. *C. de reb. al. n. al.*

IV.

4. Minors, and others.

Minors, Madmen, Prodigals, and other Perſons who are debarred from the Adminiſtration of their Eſtates, cannot ſell them: and their Sales are null [d], if they have not been made in due form.

[d] Si ſciens emam ab eo cui bonis interdictum ſit—— dominus non ero. *l.* 26. *ff. de contr. empt.* Furioſus nullum negotium genere poteſt. §. 8. *inſt. de inutil. ſtip. Tit. ff. de reb. eor. qui ſub tut. vel cura.*

Of Things which cannot be ſold.

V.

5. Things Publick.

WHatever Nature and the Laws make common, either to all Mankind in general, or to a Kingdom, or a Town, cannot be ſold. Thus, Sea-Ports, Highways, publick Market-Places, with the Walls and Ditches of Towns, and all other Things which this common and publick Uſe incapacitates for Sale, cannot be ſold [e].

[e] (Emi non poſſunt) quorum commercium non ſit. Ut publica, quæ non in pecunia populi, ſed in publico uſu habeantur. Ut eſt Campus Martius. *l.* 6. *ff. de contr. empt.*

VI.

6. Things conſecrated; Immoveables belonging to Churches, and Corporations.

Things conſecrated, Immoveables belonging to Churches, and to Corporations, to Minors, Mad-men, declared Prodigals, and to other perſons who cannot diſpoſe of their Eſtates, cannot be ſold, nor otherwiſe alienated, unleſs for neceſſary cauſes; and the formalities preſcribed in theſe kinds of Sales, muſt be ſtrictly obſerved [f].

[f] Jubemus nulli poſthac Archiepiſcopo, &c. *l.* 14. *C. de ſacroſ. Eccl. Nov.* 7. *Nov.* 120. Emi non poſſunt ſacra. *l.* 6. *ff. de contr. empt. Tit. ff. de reb. eor. qui ſub tut. Tit. C. de prad. & al. reb. min. V. l.* 21. *C. de ſacr. Eccleſ.*

VII.

7. An Eſtate entailed.

An Eſtate entailed, cannot be ſold, whilſt the Entail laſts [g].

[g] *See the third Article of this Section.*

VIII. The

VIII.

8. *Dower Lands.* The Lands which a married Woman brings along with her in Dowry to her Husband, cannot be sold, in the places where it is prohibited to alienate them, unless it be in cases that are excepted, and where the Rules prescribed for such Sales, are observed [h].

[h] *Titul. ff. de fundo dotal. l. un. in f. C. de rei uxor. act.* See the thirteenth Article of the first Section of Dowries.

IX.

9. *Things of which the Commerce is forbid.* Things of which the Commerce is prohibited by some Law, cannot be sold: Such as Arms to an Enemy, and other Things of the like nature [i].

[i] *Tit. C. quæ res ven. non possunt, & tit. quæ res export. non debent.*

We have not set down here among the Rules, touching Things which cannot be sold, that Rule of the Roman *Law, which prohibits the Alienation of things that are litigious, and annuls all such Sales, to whomsoever they are made. Because our Custom has limited these Prohibitions to Sales made to Persons, who by their Authority, or Quality, are able to create trouble to those who pretend a Right to what is in dispute; such as the Judges, and other Officers who have a share in the Administration of Justice.* V. tit. ff. & Cod. de litigios. and the Preamble to this Section.

Of the other Causes which annul Sales.

X.

10. *Sales null thro' the default of a Condition.* THE Sales of which the accomplishment depends on a Condition, remain null, if the condition does not come to pass; and it is the same thing if the thing sold perishes before the condition happens [l].

[l] Si sub conditione res venierit, si quidem defecerit conditio, nulla est emptio. *l. 8. ff. de per. & com.*

XI.

11. *Error in the Contracters.* If the Seller and Buyer have erred, so that it appears that the Seller meant to sell one thing, and the Buyer thought of purchasing another, the Sale will be null [m]. And much more will it be so, if the Seller sold knavishly one Commodity for another [n].

[m] Si error aliquis intervenit, ut aliud sentiat putà qui emit, aut qui conducit: aliud qui cum his contrahit; nihil valet quod acti sit. *l. 57. ff. de obl. & act. l. 9. ff. de contr. empt.* See the tenth Article of the fifth Section of Covenants.

[n] Si æs, pro auro veneat, non valet (venditio) *l. 14. in f. ff. de contr. empt.*

XII.

12. *Error in the qualities of the Thing sold.* If the Error is not in the Substance of the thing sold, but in its Qualities; we must judge by the circumstances, whether the Sale ought to subsist, or not [o]. And this depends on the Rules which shall be explained in the eleventh Section.

[o] *V. totam l. 9. & seq. ff. de contr. empt.*

XIII.

13. *Fraud and Violence.* If the Sale has been transacted by Fraud, or Violence, it will be null; pursuant to the Rules which shall be explained in the Title of the Vices in Covenants [p].

[p] Si voluntate tua fundum tuum filius tuus venundedit, dolus ex calliditate atque insidiis emptoris, argui debet: vel metus mortis, vel cruciatus corporis imminens detegi, ne habeatur rata venditio. *l. 8. C. de rese. vend.*

SECT. IX.

Of the Rescission of Sales, on account of the lowness of the Price.

1. *Damage in more than half the Price.*
2. *Time of Estimation.*
3. *In what manner the true Value is to be estimated.*
4. *The Buyer has it in his choice, to give back the thing, or make up the full Price.*
5. *This Rescission is independent of Fraud.*
6. *Restitution of the Fruits against the person who knows he has no good title to the possession.*

I.

1. *Damage in more than half the Price.* IN the Sales of Immoveables, if the Price be less than the half of the real Value, the Seller may get the Sale to be declared void [a].

[a] Rem majoris pretii, si tu vel pater tuus minoris distraxerit: humanum est, ut, vel pretium te restituente emptoribus, fundum venundatum recipias, authoritate judicis intercedente: vel, si emptor elegerit, quod deest justo pretio recipias. Minus autem pretium esse videtur, si nec dimidia pars veri pretii, soluta sit. *l. 2. C. de rese. vend. l. 8. eod.*

See the fourth Article.

This Rescission of Sales on account of the lowness of the Price, is limited to the Sales in which the Price does not amount to half the Value of the Lands; and the Civil Policy suffers the Sales, where the damage is less, to subsist; because it is for the interest of the Publick not to disturb the Commerce of Sales, by too frequent Rescissions.

II.

2. *Time of Estimation.* The true Price by which the Damage is to be estimated, is the Value of the thing at the time of the Sale [b].

[b] Pretii quod fuerat tempore venditionis. *l. 8. C. de rese. vend.*

III. Since

III.

3. *In what manner the true value is eſtimated.* Since there is always more and leſs in the Price of things, the Eſtimation of the true Price by which we muſt examine if there is any Damage, ought to be made according to the higheſt Price that the thing might juſtly be worth at the time of Sale. Becauſe that Price is juſt, and we ought to favour the Seller who is wronged [c].

[c] *It is a conſequence of the Motive of Humanity which has made this Reſciſſion to be received.*

IV.

4. *The Buyer has it in his choice, to give back the thing, or make up the full Price.* If the Thing is ſold for leſs than the half of its juſt Price, the Buyer ſhall have it in his choice, either to reſtore the Thing, and to take back the Price which he had paid; or to make up the juſt Price, and to keep the Thing [d].

[d] Vel pretium te reſtituente emptoribus, fundum venundatum recipias —— vel ſi emptor elegerit, quod deeſt juſto pretio, recipias. *l.* 2. *C. de reſc. vend.*

V.

5. *This Reſciſſion is independent of Fraud.* This Reſciſſion on account of the lowneſs of the Price, is independent on the Honeſty or Knavery of the Buyer. And whether he knew, or was ignorant of the value of the thing ſold; it ſuffices for reſcinding the Sale, that the Price be leſs than the half of the true value [e].

[e] *d. l.* 8. *C. de reſc. vend.* Et ſi nullus dolus interceſſit ſtipulantis, ſed ipſa res in ſe dolum habet. *l.* 36. *ff. de verb. obl.* This is what is called *dolus re ipſâ.*

VI.

6. *Reſtitution of the Fruits againſt the perſon who knows he has no good title to the poſſeſſion.* If there is no other defect in the Sale beſides the Damage of more than the half of the juſt Price, the Buyer will be obliged to reſtore the Fruits only from the time of the Demand, or the Intereſt of the remaining part of the Price, if he keeps the thing. But if there were other Vices in the Sale, ſuch as Uſury, Fraud, or Violence; he will be bound to make Reſtitution of the Fruits even from the time of his Poſſeſſion of the Thing; deducting the Intereſt of the Price which he had paid for it [f].

[f] Si fundum veſtrum vobis per denuntiationem admonentibus, volentem ad emptionem accedere, quod diſtrahentis non fuerit, non rectè is contra quem preces funditis, comparavit, vel alio modo mala fide contraxit: tam fundum veſtrum conſtitutum probantibus, quàm fructus quos cum mala fide percepiſſe fuerit probatum, aditus præſes provinciæ reſtitui jubebit. *l.* 17. *C. de reſc. vend.*

SECT. X.

Of Eviction, and other Troubles to the Purchaſer.

The CONTENTS.

1. *Definition of Eviction.*
2. *Of the other Troubles.*
3. *Warranty.*
4. *No Warranty againſt Violence, Caſualty, or the Act of the Sovereign.*
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6. *Warranty in Law.*
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23. *Warranty may be demanded before the Purchaſer is moleſted.*
24. *Warranty of Law in the Sale of Rights.*
25. *Warranty in the Sale of an Inheritance.*
26. *Warranty in the Sale of a Debt.*

I. Eviction

I.

1. *Definition of Eviction.*

EViction is the loss which the Buyer suffers, either of the whole thing that is sold, or of a part of it, because of the right which a third person has to it [a].

[a] *This Definition results from the whole tenour of this Section.*

II.

2. *Of the other Troubles.*

The other Troubles are those, which, without touching the Property of the Thing sold, diminish the Right of the Purchaser; as if any one pretends a right to the Usufruct of Lands that are sold, to a Ground-Rent, a Service, or other charges of the like nature [b].

[b] *These charges diminishing the right of the Purchaser, are Troubles against which the Seller ought to warrant him.*

III.

3. *Warranty.*

The Buyer from whom the thing is evicted, or who is troubled in his Possession of it, or in danger of being so, has his recourse against the Seller, who ought to warrant him: That is, to put a stop to the Eviction, and other Troubles, as shall be shewn in the following articles [c].

[c] Sive tota res evincatur, sive pars, habet regressum emptor in venditorem. *l. 1. ff. de evict.*
See the third Article of the second Section.

IV.

4. *No Warranty against Violence, Casualty, or the Act of the Sovereign.*

The Seller is not bound to warrant the Buyer against acts of meer Force and Violence, Casualties, or against the Act of the Sovereign [d].

[d] Lucius Titius prælia in Germania trans Rhenum emit, & partem pretii intulit: cùm in residuam quantitatem hæres emptoris conveniretur, quæstionem retulit, dicens has possessiones ex præcepto principali partim distractas, partim veteranis in præmia assignatas: quæro an hujus rei periculum ad venditorem pertinere possit. Paulus respondit, futuros casus evictionis post contractam emptionem, ad venditorem non pertinere. Et ideo secundùm ea quæ proponuntur, pretium prædiorum peti posse. *l. 11. ff. de evict.*

V.

5. *Two sorts of Warranty; Warranty in Law, and Warranty by Deed.*

Warranty being a consequence of the Contract of Sale, there is a first kind of Natural Warranty, which is called Warranty *in Law*, because the Seller is obliged to it by Law, altho' the Sale make no mention of it. And it being in our power to augment or diminish our Natural Engagements by Covenants, there is a second kind of Warranty, which is a Warranty *by Deed*, or *Covenant*, such as the Seller and Buyer are pleased to regulate among themselves [e].

[e] Imprimis sciendum est in hoc judicio, id demum deduci quod præstari convenit. Cùm enim sit bonæ fidei judicium, nihil magis bonæ fidei congruit, quàm id præstari, quod inter contrahentes actum est. Quòd si nihil convenit, tunc ea præstabuntur, quæ naturaliter insunt hujus judicii potestate. *l. 11. §. 1. ff. de act. empt. & vend.*

VI.

6. *Warranty in Law.*

Warranty in Law, or Natural Warranty, is the Security which every Seller is bound to give, for maintaining the Buyer in the free Possession and Enjoyment of the Thing sold; and for putting a stop to Evictions, and other Troubles that shall be given to the Buyer by any person whatsoever, who shall pretend either a Right of Property, or any other Right in the thing sold, by which the Right, which ought naturally to be acquired by the Sale, would be diminished. And the Seller is obliged to this Warranty, altho' it be not stipulated by Covenant [f].

[f] Non dubitatur, etsi specialiter venditor evictionem non promiserit, re evicta ex empto competere actionem. *l. 6. C. de evict.*
Imprimis ipsam rem præstare venditorem oportet. Id est, tradere, quæ res, si quidem dominus fuit venditor, facit & emptorem dominum. Si non fuit tantùm evictionis nomine, venditorem obligat. *l. 11. §. 2. ff. de act. empt. & vend.* Sive tota res evincatur, sive pars, habet regressum emptor in venditorem. *l. 1. ff. de evict. v. l. 10. eod.* Ex empto actionem esse, ut habere licere emptori cveatur. *l. 11. §. 8. ff. de act. empt. & vend.* Ut emptori habere liceat, & non solum per se, sed per omnes. *l. 11. §. 17. ff. de act. empt. & vend.*

VII.

7. *Warranty by Deed.*

Warranty by Deed or Covenant, is the Security which the Seller promises, either greater or lesser than what he is bound to by Law, according as the Parties have agreed between themselves. Thus, they may add to the Warranty in Law; as if it be agreed, that the Seller should warrant the Buyer against the act of the Sovereign. And they may likewise restrain the Warranty in Law; as if it be agreed, that the Seller should only warrant against his own proper deed, and not against the Rights of other persons: or that he shall only restore the Price in case of Eviction, and not the Damages [g]. And all these Agreements have their Justice, in that the Buyers purchase at a cheaper or dearer rate, or upon other views: and in that the Purchaser buys in effect only what is sold, and such as the Seller is willing to warrant it.

[g] Nihil magis bonæ fidei congruit, quàm id præstari quòd inter contrahentes actum est. *l. 11. §. 1. ff. de act. empt & vend.*
Qui autem habere licere vendidit, videamus quid debeat præstare, & multùm interesse arbitror utrùm hoc polliceatur per se venientesque à se personas non fieri, quominùs habere liceat, an verò per omnes:

nam ſi per ſe, non videtur id præſtare ne alius evincat. *d. l.* 11. §. 18. Si aperte in venditione comprehendatur, nihil evictionis nomine præſtatum iri, pretium quidem deberi, re evicta, utilitatem non deberi. *d.* §. 18. Niſi forte ſic quis omnes iſtas ſuprafcriptas conventiones recipiet. *d.* §. 18.

VIII.

8. The Seller cannot be diſcharged from the Warranty againſt his own proper Deed.

The Seller cannot be diſcharged from the Warranty againſt his own proper fact and deed, not even by an expreſs Agreement; for it would be contrary to Good Manners that he ſhould be allowed to act a diſhoneſt part [h].

[h] Illud non probabis, dolum non eſſe præſtandum ſi convenerit. Nam hæc conventio contra bonam fidem, contraque bonos mores eſt. Et ideo nec ſequenda eſt. *l.* 1. §. 7. *ff. de pact.* Pacta quæ turpem cauſam continent, non ſunt obſervanda. *l.* 27. §. 4. *ff. de pact.*

IX.

9. Warranties regulated by particular Cuſtoms.

If beſides the Natural Warranty, and the Warranty by Agreement, there is any particular Cuſtom, or Uſage, in a place, which regulates any ſort of Warranty, the Seller ſhall be bound to ſuch Warranty [i].

[i] Quia aſſidua eſt duplæ ſtipulatio, idcircò placuit etiam ex empto agi poſſe, ſi duplam venditor mancipii non caveat. Ea enim quæ ſunt moris, & conſuetudinis, in bonæ fidei judiciis debent venire. *l.* 31. §. 20. *ff. de ed. ed.* Si fundus venierit ex conſuetudine ejus regionis, in qua negotium geſtum eſt, pro evictione caveri oportet. *l.* 6. *ff. de evict.*

X.

10. Damages for Eviction, and other Troubles.

If the Purchaſer loſes the Thing by Eviction, or is troubled in his Poſſeſſion, the Warranty ſhall have its effect [l], purſuant to the Rules explained in the articles which follow.

[l] Sive tota res evincatur, ſive pars, habet regreſſum emptor in venditorem. *l.* 1. *ff. de evict.*

XI.

11. Divers effects of the Troubles which are given to the Seller.

There are Troubles which of their nature diſſolve the Sale; as when the Proprietor evicts the thing from the Purchaſer [m]. Others there are which of their nature may diſſolve, or not diſſolve the Sale, according to the circumſtances. Thus, an Action in right of a Mortgage does not annul the Sale, if either the Seller or Purchaſer acquits the Debt; but if the Eſtate is adjudged to the Creditors, the Sale is diſſolved. And in all theſe caſes, whether it be that the Sale ſubſiſts, or is diſſolved, the Seller is anſwerable for the Damages according to the effect of the Trouble [n].

[m] Sive tota res evincatur, ſive pars. *l.* 1. *ff. de evict.*

[n] Ad id quod intereſt. *l.* 70. *ff. de evict.*

XII.

12. Reſtitution of the Price, with Damages.

If the Sale is diſſolved by an Eviction, the Seller is bound to reſtore the Price, and to indemnify the Buyer of the Damages which he may ſuſtain thereby [o], as ſhall be explained in the following Articles.

[o] Evicta re ex empto actio non ad pretium dumtaxat recipiendum, ſed ad id quod intereſt, competit. *l.* 70. *ff. de evict. l.* 60. *eod.*

XIII.

13. If the thing is not changed at the time of the Eviction.

If the thing ſold is in the ſame condition, and of the ſame value, at the time of the Eviction, as it was at the time of Sale, the Seller ſhall be bound only to reſtore the Price which he received, the charges of the ingroſſement of the Deed, thoſe of taking Poſſeſſion, and to make good the other Damages, if there are any; as if the Purchaſer of an Eſtate in Lands, which are evicted, had paid a Fine of Alienation [p].

[p] Si in venditione dictum non ſit, quantum venditorem pro evictione præſtare oporteat, nihil venditor præſtabit præter ſtipulam evictionis nomine, & ex natura ex empto actionis, hoc, quod intereſt. *l.* 60. *ff. de evict.*

XIV.

14. If the thing is diminiſhed at the time of the Eviction.

If, on the contrary, the thing ſold is waſted or diminiſhed, whether by its own Nature, as an old Houſe, or by a Caſualty, as if a Flood has carried away a part of an Eſtate; or if the thing being in the ſame condition, its value is diminiſhed by the effect of time; in all theſe caſes, and others of the like nature, where the thing ſold is worth leſs at the time of the Eviction, than the Price which the Buyer paid for it; he can recover againſt the Seller, only the preſent value of the Thing, ſuch as it is at the time of the Eviction [q]. For it is only in this preſent Value that the Buyer's loſs doth conſiſt. And as the diminution which preceded the Eviction, regarded the Buyer, he ought not to be a gainer by the Eviction.

[q] Si minor eſſe cœpit, damnum emptoris erit. *l.* 70. *ff. de evict.* Ut quanti ſua intereſt, actor conſequatur, ſcilicet ut melioris, aut deterioris agri facti cauſa, finem pretii, quo fuerat tempore diviſionis æſtimatus, diminuat vel excedat. *l.* 66. *in f. ff. eod.*

Ex mille jugeribus traditis ducenta flumen abſtulit. Si poſtea pro indiviſo, ducenta evincantur, duplæ ſtipulatio pro parte quinta, non quarta præſtabitur. Nam quod periit, damnum emptori non venditori attulit. *l.* 64. *eod.* Minuitur præſtatio, ſi ſervus deterior apud emptorem effectus ſit, cùm evincitur. *l.* 45. *ff. de act. empt. & vend.*

XV. But

XV.

15. If the thing has increased in Price.

But if the thing happens to be worth more at the time of the Eviction, than it was at the time of Sale, the Price having been augmented by the effect of time; the Seller shall be bound to the Buyer for what the thing is worth at the time of the Eviction. For he loses in effect this Value, the thing being evicted from him; and his condition ought not to be made worse by this event, against which the Seller is bound to warrant him.

[r] Quanti sua interest actor consequatur, &c. *l. 66. in f. ff. de evict.* See the preceding Article, where this Law is quoted.

Si quid ex his finibus evinceretur pro bonitate ejus emptori præstandum. *l. 45. eod. l. 1. eod.*

XVI.

16. If the Purchaser has made Improvements.

If the thing sold happens to be improved at the time of the Eviction, by the deed of the Purchaser, as if he has either planted or built on an Estate, he shall be indemnified by the Seller as to what the Estate would have been worth at the time of the Eviction, if it had not been improved: and he will moreover recover the Expences he has been at in improving it; and he cannot be turned out of Possession, till he is reimbursed of the said Expences, either by the person who evicts the Estate, for he ought not to reap the profit of those Improvements; or by the Seller, who is bound to warrant him against the Eviction. And he shall have his Action both against the one and the other[s].

[r] Consequeris (à venditore) quanti tuâ interest. In quo continetur etiam eorum persecutio, quæ in rem emptam à te, ut melior fieret, erogata sunt. *l. 9. C. de evict. l. 16. eod.*

Si mihi alienam aream vendideris, & in ea ego ædificavero, atque ita eam dominus evincit; nam quia possum petentem dominum, nisi impensam ædificiorum solvat, doli mali exceptione summovere, magis est, ut ea res ad periculum venditoris non pertineat. *l. 45. §. 1. ff. de act. empt. & vend. l. 16. C. de evict.* See the following Articles, as also the twelfth and following Articles of the third Section of the Title of Dowries.

It is said in this ninth Law, Cod. de evict. *that the Seller is bound to refund the charges of the Improvements to the Buyer from whom the Estate is evicted: And in this forty fifth Law,* §. 1. ff. de act. empt. & vend. *that this Reimbursement is to be made by the person who evicts, and ought not to fall upon the Seller. Which ought to be understood in the sense explained in the Article: and in such a manner, as that if, for example, he who would recover the Lands, pretends that he is not bound to refund the charges of the Improvements, or raises any other dispute about them, the Purchaser has his Action of Warranty against his Seller.*

XVII.

17. The regard

In making an Estimate of the Charges laid out by the Purchaser of an Estate on Improvements; as if he has made a Plantation in it, we must balance the Charges laid out, with the Fruits arising from the Improvements, and which have increased the Rent of the Estate. So that if the Fruits which the Purchaser has reaped from the Improvements, acquit the Principal Sum, and Interest, of the Monies laid out on them, there will be no Reimbursement due; it being enough for the Buyer that he loses nothing. And if the Fruits come short of the Charges laid out on the Improvements, the Purchaser will recover the Remainder of the Money he has laid out, both Principal and Interest[t]; for he ought to lose nothing. But if the Fruits which the Purchaser has reaped from the Improvements exceed the charges he has been at, he shall have the advantage of them.

which is to be had to the fruits which have been reaped, in order to make an Estimate of the Improvements.

[t] Super empti agri quæstione disceptabit Præses Provinciæ: & si portionem diversæ partis esse cognoverit, impensas, quas ad meliorandam rem vos erogasse constiterit, habita fructuum ratione, restitui vobis jubebit. *l. 16. C. de evict.* Sumptus in prædium, quod alienum esse apparuit, à bonæ fidei possessione facti, neque ab eo qui prædium donavit, neque a domino peti possunt: verùm exceptione doli appositâ, per officium judicis, æquitatis ratione servantur: si fructuum ante litem contestatam perceptorum summam, excedant; etenim admissâ compensatione, superfluum sumptum, meliore prædio facto, dominus restituere cogitur. *l. 48. ff. de rei vind.* Emptor prædium, quod à non domino emit, exceptione doli posita non aliter restituere domino cogetur, quàm si pecuniam creditori ejus solutam, qui pignori datum prædium habuit, usurarumque medii temporis superfluum, recuperaverit: scilicet si minus in fructibus ante litem perceptis fuit. Nam eos usuris nobis duntaxat compensari, sumptuum in prædio factorum exemplo, æquum est. *l. 65. ff. de rei vindic.*

What is said in this Article, that the Buyer shall reap the profit of the Fruits which are over and above his Reimbursement, ought to be understood of the Fruits which he reaped while he knew nothing of his Title being called in question, and before any Legal Demand was made. See the third Section of the Title of Interest, Costs and Damages, and Restitution of Fruits.

XVIII.

18. The circumstances oblige us to regulate differently the difficulties relating to the Improvements.

If the charges laid out upon the Improvements are less than their value, the Purchaser who is evicted will recover only the charges he has laid out. And if on the contrary the charges exceed the value of the Improvements, he will recover no more than the real value of the Improvements. But according to the circumstances, it will be prudent in the Judge not to deprive the Buyer of reasonable Charges, such as the Master of the thing might, and ought to have laid out: and likewise not to overburden the Seller, or the person who evicts. And it is necessary to regulate these matters according as the nature of the Expences

may require, or the quality of the Perſons, the neceſſity or uſefulneſs of the Improvements, and whatever elſe may be fit to be conſidered in the State of the things[u].

[u] In fundo alieno, quem imprudens emeras ædificaſti, aut conſeviſti: deinde evincitur, bonus judex varie ex perſonis, cauſiſque conſtituet. Finge & dominum eadem facturum fuiſſe, reddat impenſam, ut fundum recipiat: uſque eo dumtaxat quo pretioſior factus eſt. Et ſi plus pretio fundi acceſſit, ſolum quod impenſum eſt. Finge pauperem, qui, ſi reddere id cogatur laribus, ſepulchriſque avitis carendum habeat? Sufficit tibi permitti tollere ex his rebus, quæ poſſis: cum ita ne deterior ſit fundus, quàm ſi initio non foret ædificatum. *l.* 38. *ff. de rei vind.*

Mediè igitur hæc à judice diſpicienda, ut neque delicatus debitor, neque oneroſus creditor audiatur. *l.* 25. *in f. ff. de pign. act.* See the nineteenth Article of the third Section of Mortgages.

XIX.

19. If the Seller has ſold the Goods of another perſon, knowing them to be ſuch.

If in the caſes of the preceding Article, the Seller had ſold that which belonged to another perſon, knowing it to be ſo, he would be bound to refund without any diſtinction all the charges laid out by the Purchaſer[x].

[x] In omnibus tamen his caſibus, ſi ſciens quis alienum vendiderit, omnino teneri debet. *l.* 45. §. 1. *in f. ff. de act. empt. & vend.*

XX.

20. He who is bound to warrant, cannot evict.

The perſons who are obliged in Warranty to the Buyer, cannot diſturb him in his Poſſeſſion, whatever right they may have to the thing ſold. Thus, the Heir of the Seller, being in his own right Proprietor of the Thing ſold, cannot evict it from the Buyer, whom he is obliged, by his quality of Heir, to warrant in his Poſſeſſion[y].

[y] Si alienum fundum vendideris & tuum poſtea factum petas, hac exceptione rectè repellendum. *l.* 1. *ff. de except. rei vend.* Sed & ſi dominus fundi hæres venditori exiſtat, idem erit dicendum. *d. l.* §. 1. *l.* 14. *C. de rei vind.*

XXI.

21. If the Purchaſer who is moleſted, does not give notice of it, or does any other prejudice to the condition of his Vouchee.

If the Purchaſer who is moleſted, ſuffers himſelf to be condemned by default, if he defends himſelf ill, if he does not give notice to the Seller of the Action that is brought againſt him, if he conſents to a Reference, or Tranſaction, without the Seller's knowledge, or if he in any other manner prejudices the condition of his Vouchee, he cannot demand Warranty againſt an Eviction, which he has no body to blame for but himſelf[z].

[z] Si ideò contrà emptorem judicatum eſt, quòd defuit, non committitur ſtipulatio. Magis enim propter abſentiam victus videtur, quàm quòd malam cauſam habuit. *l.* 55. *ff. de evict.* Si cum poſſet emptor, auctori denuntiare, non denuntiaſſet, ide faciſſet, quoniam parùm inſtructus eſſe viderur dolo feciſſe. Et ex ſtipulatu ag[illegible] teſt. *l.* 53. §. 1. *eod.* Si compromiſero, & contra me data fuerit ſententia, nulla mihi actio de evictione danda eſt adverſus venditorem. Nulla enim neceſſitate cogente id feci. *l.* 56. §. 1. *eod. v. l.* 63. *eod.*

XXII.

22. The Buyer is only bound to give notice to the Seller of the diſturbance that is given him.

After that the Buyer has intimated to the Seller the Action that is brought againſt him, he is not bound either to defend it, or to Appeal, if he is condemned. And whether he defends it, or not, the Seller will remain bound to warrant him againſt the Event[a].

[a] Gaia Seia fundum à Lucio Titio emerat, & quæſtione mota fiſci nomine, auctorem laudaverat, & evictione ſecutâ fundus ablatus, & fiſco adjudicatus eſt venditore præſente. Quæritur, cùm emptrix non provocaverat, an venditorem poterit convenire? Herennius Modeſtinus reſpondit, ſive quòd alienus fuit, cùm veniret, ſive quod tunc obligatus, evictus eſt, nihil proponi, cur emptrici adverſus venditorem actio non competat. *l.* 63. §. 1. *ff. de evict.*

XXIII.

23. Warranty may be demanded before the Purchaſer is moleſted.

If the Purchaſer diſcovers that the Seller has ſold him that which belongs to another perſon, and which the Seller knew to be ſuch, he may bring his Action againſt the Seller, altho' he be not as yet diſturbed in his poſſeſſion, to oblige him to remove the danger of the Eviction; and to recover the Damages which he may ſuffer by ſuch a ſale[b].

[b] Si ſciens alienam rem ignoranti mihi vendideris, etiam priuſquam evincatur utiliter me ex empto acturum putavit, in id quanti mea interſit, meam eſſe factam. Quamvis enim alioquin verum ſit, venditorem hactenus teneri, ut rem emptori habere liceat, non etiam ut ejus faciat: quia tamen dolum malum abeſſe præſtare debeat, teneri eum qui ſciens alienam, non ſuam ignoranti vendidit. Idem eſt maximè, ſi manumiſſuro, vel pignori daturo vendiderit. *l.* 30. §. 1. *ff. de act. empt. & vend.*

XXIV.

24. Warranty of Law in the Sale of Rights.

As in the Sales of Moveables and Immoveables, Natural Warranty obliges the Seller to deliver, and warrant a Thing which is in being; ſo likewiſe in the Sales, or Conveyances of Rights, ſuch as a Debt, an Action, an Inheritance, Natural Warranty obliges the Transferor to transfer a Right which ſubſiſts, a Debt which is due, an Inheritance which has fallen, an Action which may be proſecuted. And if the Transferor had not the Right which he ſells and transfers, the Sale would be null; and he would be bound to reſtore the Price, and to make good the Damages of the Buyer, or Transferee[c].

[c] Si hæreditas venierit ejus qui vivit, aut nullus ſit nihil eſſe acti, quia in rerum natura non ſit, quod venierit. *l.* 1. *ff. de hæred. vel act. vend.*

Cùm

Cùm hæreditatem aliquis vendidit, eſſe debet hæreditas, ut ſit emptio. Nec enim alia emitur, ut in venatione & ſimilibus, ſed res: quæ ſi non eſt, non contrahitur emptio: & ideo pretium condicetur: *l. 7. ff. de hæred. vel act. vend.* Si quid in eam rem impenſum eſt, emptor à venditore conſequatur: & ſi quid emptoris intereſt. *l. 8. in f. & l. 9. eod.* Si nomen ſit diſtractum, Celſus libro nono Digeſtorum ſcribit, locupletem eſſe debitorem, non debere præſtare: debitorem autem eſſe præſtare, niſi aliud convenit. *l. 4. eod.* See the twenty ſixth Article.

XXV.

25. *Warranty in the Sale of an Inheritance.*

The Heir who ſells and transfers an Inheritance, without ſpecifying the Goods contained in it, the Rights, or the Charges, is bound to warrant nothing, but his Quality, and Right of Heir; for it is that which he ſells. And he is not bound to warrant either any Charge, or any particular Goods, or any Right belonging to the Inheritance; unleſs he be expreſly obliged to it by Covenant [d]. But if he had already received any Profit from any thing belonging to the Inheritance, he ought to reſtore it to the perſon to whom he ſells the Inheritance, as being included in the Sale, unleſs he has expreſly reſerved it [e].

[d] Venditor hæreditatis ſatis dare de evictione non debet, cùm id inter ementem & vendentem agatur, ut neque ampliùs, neque minus juris emptor habeat, quàm apud hæredem futurum eſſet. *l. 2. ff. de hæred. vel act. vend.*

Emptor hæreditatis rem à poſſeſſoribus ſumptu ac periculo ſuo perſequi debet. Evictio quoque non præſtatur in ſingulis rebus, cùm hæreditatem jure veniſſe conſtat, niſi aliud nominatim inter contrahentes convenit. *l. 1. C. de evict. l. 14. in f. & l. 15. de hæred. vel act. vend.* Sicuti lucrum omne ad emptorem hæreditatis reſpicit, ita damnum quoque debet ad eumdem reſpicere. *l. 2. §. 9. eod.*

[e] Hoc agi videtur, ut quod ex hæreditate pervenit, in id tempus quo venditio fit, id videatur veniſſe. *l. 2. §. 1. eod.*

XXVI.

26. *Warranty in the Sale of a Debt.*

He who ſells and transfers a Debt, ought only to warrant that what he transfers is really and truly due to him. And he is not to warrant the Debtor to be ſolvent, unleſs he is obliged to it by the Conveyance he has made to him of the Debt [f]. For it is only a Right which he ſells.

[f] Si nomen ſit diſtractum, Celſus libro nono Digeſtorum ſcribit, locupletem eſſe debitorem, non debere præſtare: debitorem autem eſſe præſtare, niſi aliud convenit. *l. 4. ff. de hæred. vel act. vend.* Qui nomen, quale fuit, vendidit: dumtaxat ut ſit, non ut exigi etiam aliquid poſſit, & dolum præſtare cogitur. *l. 74. in f. ff. de evict.*

SECT. XI.

Of Redhibition, and Abatement of the Price.

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I.

1. *Definition of Redhibition.*

BY Redhibition is meant, the diſſolution of the Sale becauſe of ſome fault or defect in the thing ſold, which is ſuch that it is ſufficient to oblige the Seller to take back the Thing, and to annul the Sale [a].

[a] Redhibere eſt, facere ut rurſus habeat, venditor, quod habuerit. Et quia reddendo id fiebat, idcirco redhibitio eſt appellata. *l. 21. ff. de adil. ed.* Judicium dabimus ut redhibeatur. *l. 1. §. 1. in fine eod.*

II.

2. *The Seller ought to declare the defects of the thing ſold.*

The Seller is obliged to declare to the Buyer the defects of the thing ſold, which are known to him [b]. And if he has not done it, either the Sale ſhall be annulled, or the Price diminiſhed, according to the quality of the defects; and the Seller ſhall be bound to make good the Damages of the Buyer, by the Rules which follow.

[b] Certiores faciant emptores quid morbi vitiive cuique ſit. *l. 1. §. 1. ff. de adil. ed.* Eademque omnia cum mancipia venibunt palam rectè pronuntianto. *d. §. 1.*

III.

3. *Diſtinction of the defects of the things ſold.*

Since it is not poſſible to reſtrain all the perfidious dealings of Sellers, and that the inconveniences would be too great to diſſolve, or call in queſtion Sales, for all manner of Defects in the things ſold; we conſider therefore only thoſe Defects which render the things altogether unfit for the uſe for which they are bought and ſold, or which diminiſh that uſe in ſuch a manner, or render it ſo inconvenient, that if they had been known to the Buyer, he would have either not bought them at all, or at leaſt not given ſo great a price for them. Thus, for Example, a Beam that is rotten, is unfit for the uſe for which it is deſigned. Thus a broken-winded Horſe does leſs Service, and it is too troubleſome to make uſe of him. And theſe defects are ſufficient to diſſolve a Sale. But if a Horſe is only dull in anſwering the Spur, this defect will make no manner of change. And in general, it depends on the Cuſtom of the place, if there is any ſuch touching this matter; or on the prudence of the Judge, to diſcern by the quality of the defects, whether the Sale ought to be diſſolved, or the Price leſſened, or whether any regard at all ought to be had to the defect [c].

[c] Res bona fide vendita, propter minimam cauſam inempta fieri non debet. *l.* 54. *ff. de contr. empt.* Si quid tale fuerit vitii, ſive morbi, quod uſum, miniſteriumque hominis impediat: id dabit redhibitioni locum: dummodo meminerimus, non utique quodlibet quam leviſſimum efficere, ut morboſus, vitioſuſve habeatur. *l.* 1. §. 8. *ff. de ædil. ed.* Qui forte ſi hoc cognoviſſet, vel empturus non eſſet, vel minoris empturus eſſet. *l.* 39. *ff. de act. empt. & vend. l.* 35. *in f. ff. de contr. empt.*

IV.

4. *Redhibition of Immoveables.*

In the Sales of Immoveables, there may be ground for Redhibition, or Abatement of the Price, if there are any defects which give occaſion to it. Thus, the Purchaſer of a Field may get the Sale diſſolved, if there ariſe out of that Ground malignant Vapours which render the uſe of it dangerous. Thus, for a Service which did not appear, and which the Seller did not declare, the Purchaſer may procure an Abatement of the Price [d], and even a Diſſolution of the Sale, if the Service is ſo very burdenſome as to give occaſion for it.

[d] Etiam in fundo vendito redhibitionem procedere nequaquam incertum eſt. Veluti ſi peſtilens fundus diſtractus ſit. Nam redhibendus erit. *l.* 49. *ff. de ædil. ed. l.* 4. *C. de ædil. act. l.* 2. §. 29. *ff. ut quid in loc. publ.* Si quis in vendendo prædio confinem celaverit, quem emptor ſi audiſſet, emp-

turus non eſſet: teneri vend *de contr. empt.* Quoties de tantum debet præſtare, quant tor, ſi ſciſſet hanc ſervitutem impoſitam. *l.* 61. *ff. de ædil. ed.*

V.

5. *Altho' the Seller be ignorant of the defects, the Buyer has his Action.*

Altho' the defects of the thing ſold were unknown to the Seller, yet the Buyer may procure the Diſſolution of the Sale, or an Abatement of the Price, if theſe defects are ſuch as give occaſion for it [e]. For ſince people buy a thing only for its uſe, if it chance to have any defect which hinders this uſe, or leſſens it, the Seller ought not to reap the advantage of an apparent Value, which the thing ſold ſeemed to have, and yet had it not.

[e] Sciamus venditorem etiam ſi ignoravit ea quæ ædiles præſtari jubent, tamen teneri debere, nec eſt hoc iniquum. *l.* 1. §. 2. *ff. de ædil. ed. l.* 21. §. 1. *ff. de act. empt. & vend.*

Si quidem ignorabat venditor, ipſius rei nomine teneri. *l.* 45. *ff. de contr. empt.*

Si quidem ignorans fecit, id tantum ex empto actione præſtaturum quanto minoris eſſem empturus, ſi id ita eſſe ſciſſem. *l.* 13. *ff. de act. empt. & vend.*

VI.

6. *Damages, if the Seller is ignorant of the defects.*

In the ſame caſe where the defects of the thing ſold were unknown to the Seller, he ſhall be bound not only to take back the Thing, or to abate the Price; but likewiſe to indemnify the Buyer, as to the charges which the Sale has put him to; ſuch as Expences for Carriages, the Duties for Entry, or others of the like nature [f].

[f] Si quas acceſſiones (emptor) præſtiterit, ut recipiat. *l.* 1. §. 1. *ff. de ædil. ed l.* 23. §. 1. & 7. *eod.*

Debet (emptor) recipere pecuniam quam dedit. *l.* 27. *eod.*

Sed & ſi quid emptionis cauſa erogatum eſt. *d. l.* 27.

Quid ergo ſi forte vectigalis nomine datum eſt, quod emptorem forte ſequeretur? dicemus hoc quoque reſtituendum. Indemnis enim emptor debet diſcedere. *d. l.* 27. *in fine.* See the following Article.

VII.

7. *Damages, if the Seller knows the defects.*

If the Seller knew the defects of the thing ſold, he ſhall be bound not only in Damages according to the foregoing Rule; but he will farther be accountable for the conſequences which the defect of the thing may have occaſioned. Thus, he who had ſold a Flock of Sheep, which he knew to be infected with a contagious diſtemper, without declaring it, would be bound to make up the loſs of the other Sheep belonging to the Buyer, which had been infected with this contagious diſtemper. And it

would

me thing, if the Seller now the defects of the he pretended to be ignorant of them; as if an Architect who furniſhes Materials for a Building, had made uſe of ſuch as were not ſound and in good condition, he would be accountable for the Damage that ſhould enſue thereupon [g].

[g] Si ſciens reticuit, & emptorem decepit; omnia detrimenta quæ ex ea emptione emptor traxerit: præſtaturum ei. Sive igitur ædes vitio tigni corruerunt, ædium æſtimationem: ſive pecora contagione morboſi pecoris perierunt, quod interfuit idoneæ veniſſe erit præſtandum. *l.* 13. *ff. de act. empt. & vend. l.* 1. *C. de edil. act.*

Si quidem ignorabat venditor, ipſius rei nomine teneri: ſi ſciebat, etiam damni quod ex eo contingit. *l.* 45. *ff. de contr. empt.*

Celſus etiam imperitiam culpæ adnumerandam libro octavo digeſtorum ſcripſit. *l.* 9. §. 5. *ff. loc.* Quod imperitia peccavit, culpam eſſe, quippe ut artifex conduxit, *d.* §. 5. See the ſecond Article of the eighth Section of Hiring and Letting to hire.

VIII.

8. *All things reſtored to the ſame condition by the Redhibition.*

If the defect of the thing ſold, gives occaſion to the Redhibition, and Diſſolution of the Sale, the Seller and Buyer ſhall be reſtored to the ſame condition, as if there had been no Sale at all. The Seller ſhall reſtore the Price, with the Intereſt of it, and ſhall reimburſe the Buyer of whatever he has laid out for the preſervation of the thing ſold, and on the other conſequences of the Sale, according to the foregoing Rules. And the Buyer ſhall reſtore the Thing to the Seller, together with all the profit which he has reaped from it. And in a word, all things ſhall be reciprocally reſtored on both ſides to the ſame condition they were in before the Sale [h].

[h] Si quid aliud in venditione acceſſerit: ſive quid ex ea re fructus pervenerit ad emptorem, ut ea omnia reſtituat. *l.* 1. §. 1. *ff. de edil. ed.* Jubent ædiles reſtitui & quod venditioni acceſſit, & ſi quas acceſſiones ipſe præſtiterit: ut utrinque reſoluta emptione, nihil amplius conſequatur, quam non haberet, ſi venditio facta non eſſet. *l.* 23. §. 1. *eod.* Facta redhibitione, omnia in integrum reſtituuntur, perinde ac ſi neque emptio, neque venditio interceſſit. *l.* 60. *eod. d. l.* 23. §. 7. See the following Article.

IX.

9. *Change of the thing before the Redhibition.*

All the changes which happen to the Thing ſold, after the Sale, and before the Redhibition, whether the thing periſhes or is diminiſhed, without the fault of the Buyer, and of the perſons for whom he is anſwerable, affect the Seller, who is bound to take back the Thing, and he likewiſe reaps the profit of the changes which make the thing better [i].

[i] Si mortuum fuerit jumentum, pari modo redhiberi poterit, quemadmodum mancipium poteſt. *l.* 30. §. 3. *ff. de edil. ed. l.* 31. §. 6. *eod.*

Si mancipium, quod redhiberi oportet, mortuum erit hoc quæretur, numquid culpa emptoris, vel familiæ ejus, vel procuratoris, homo demortuus ſit. *d. l.* 31. §. 11. *l.* 10. *ff. de reg. jur.*

X.

10. *If the defects are evident, or declared by the Seller.*

If the defects of the thing ſold are evident, as if a Horſe has his eyes put out, the Buyer cannot complain of theſe ſorts of defects, which being viſible he could not be ignorant of [l]; no more than of thoſe defects which the Seller told him of [m].

[l] Si quis hominem luſcinibus effoſſis emat, & de ſanitate ſtipuletur, de cætera parte corporis potius ſtipulatus videtur, quam de eo, in quo ſe ipſe decipiebat. *l.* 43. §. 1. *ff. de contr. empt.*

Si intelligatur vitium, morbuſve mancipii, ut plerumque ſignis quibuſdam ſolent demonſtrare vitia: poteſt dici edictum ceſſare. Hoc enim tantùm intuendum eſſe, ne emptor decipiatur. *l.* 1. §. 6. *ff. de ed. ed. l.* 14. §. *ult. eod.*

[m] Si venditor nominatim exceperit de aliquo morbo, & de cætero ſanum eſſe dixerit, aut promiſerit, ſtandum eſt eo quod convenit. *d. l.* 14. §. 9.

XI.

11. *If the defects may be known or preſumed.*

If the defects of the thing ſold are ſuch as the Buyer might have eaſily known, and been certain of, as if a Field is ſubject to be overflowed; if a Houſe is old; if the Beams of it are rotten; if it is ill built; the Buyer cannot complain of theſe ſorts of defects, nor of others of the like nature. For the thing is ſold to him, ſuch as he ſees it [n].

[n] Si intelligatur vitium morbuſve mancipii ut plerumque ſignis quibuſdam ſolent demonſtrare vitia, poteſt dici edictum ceſſare. Hoc enim tantùm intuendum eſt, ne emptor decipiatur. *l.* 1. §. 6. *ff. de ed. ed.*

Ad ea vitia pertinere edictum ædilium probandum eſt, quæ quis ignoravit, vel ignorare potuit. *l.* 14. §. *ult. eod.*

XII.

12. *If the Seller has declared that the thing has ſome quality which renders it better.*

If the Seller has declared the thing ſold to have ſome other quality, beſides thoſe which he is bound to warrant naturally; and that quality happens to be wanting, or that even the thing ſold happens to have the contrary defects; we ought to judge of the effect of this declaration of the Seller, by the circumſtances of the conſequence of the qualities which he has expreſs'd, of the knowledge which he might or ought to have of the truth, contrary to what he has ſaid, of the manner in which he engaged the Buyer; and above all, it is neceſſary to conſider if theſe qualities have made a condition without which the Sale would not have been concluded.

ed. And according to the circumſtances, either the Sale ſhall be diſſolved, or the Price diminiſhed; and the Seller ſhall be bound in Damages, if there is ground for it. Thus, for Example, if the Seller of an Eſtate has declared it to be Allodial, and has ſold it as ſuch, and that this Eſtate happens to be ſubject to a Quit-Rent, and that the Buyer is obliged to pay a Fine of Alienation; the Seller ſhall be bound to indemnify the Purchaſer from theſe charges, and the other conſequences, according to the circumſtances, even altho' he had been ignorant that the Lands were ſubject to this Quit-Rent. But if the Seller has only made uſe of thoſe expreſſions which are uſual to Sellers, who praiſe at random their Goods which they have a mind to ſell, the Buyer, who ought not to have taken his meaſures upon expreſſions of that kind, cannot procure the Sale to be diſſolved upon any ſuch pretext [o].

[o] Si quid venditor de mancipio affirmaverit, idque non ita eſſe emptor queratur, aut redhibitorio, aut æſtimatorio, id eſt, quanto minoris judicio agere poteſt. *l.* 18. *ff. de edil. ed.* Si prædii venditor non dicat de tributo ſciens, tenetur ex empto.—Venditor teneri debet, quanti intereſt non eſſe deceptum, etſi venditor quoque neſciet: veluti, ſi menſas quaſi citreas emat, quæ non ſunt. *l.* 21. §. 1. & 2. *ff. de act. empt. & vend.*

Sciendum tamen eſt, quædam etſi dixerit præſtare eum non debere. Scilicet ea quæ ad nudam laudem ſervi pertinent. *l.* 19. *eod.* Ut enim Pedius ſcribit, multum intereſt commendandi ſervi cauſa, quid dixerit, an vero præſtaturum ſe promiſerit, quod dixit. *d. l.* 19. *eod. d. l.* §. 3. *l.* 43. *eod. v. l.* 16. *ff. de hæred. vel. act. vend.* Quid tamen, ſi ignoravit quidem furem eſſe, aſſeveravit autem bonæ frugi & fidum, & caro vendidit? Videamus an ex empto tenetur? Et putem teneri. At qui ignoravit. Sed non debuit facilè quæ ignorabat, adſeverare. Inter hunc igitur, & qui ſcit, intereſt. Qui ſcit, præmonere debuit furem eſſe, hic non debuit facilis eſſe ad temerariam indicationem. *l.* 13. §. 3. *ff. de act. empt.*

See the twelfth and fourteenth Articles of the third Section of Covenants; and the ſecond Article of the third Section of the Vices of Covenants.

XIII.

13. *An Eſtate ſold ſuch as it is.*

If an Eſtate in Land is ſold ſuch as it is, or in the ſame condition as the Seller has fairly enjoyed it, or with its rights and conditions; theſe expreſſions, and others of the like nature, are no hindrance why the Seller ſhould not remain obliged to warrant the Lands againſt hidden Services, and all unknown Charges; ſuch as a Ground-Rent to which the Land ſhould be found to be liable [p].

[p] Lucius Titius promiſit de fundo ſuo centum millia modiorum frumenti annua præſtare prædiis Gaii Seii. Poſtea Lucius Titius vendidit fundum, additis verbis his, quo jure, quaque conditione ea prædia Lucii Titii hodie ſunt, ita veneunt, itaque habebuntur. Quæro, an emptor Gaio Seio ad præſtationem frumenti ſit obnoxius? Reſpondit, emptorem Gaio Seio, ſecundùm ea quæ proponerentur, obligatum non eſſe. *l. ult.* §. *ult. ff. de contr. empt. v. l.* 69. §. 5. *ff. de evict. l.* 61. *ff. de edil. ed.* See the following Article.

XIV.

14. *Defect in expreſſion by the Seller.*

The Seller is obliged to explain clearly, and diſtinctly, which is the thing that is ſold, in what it conſiſts, its qualities, its defects, and every thing that may give occaſion to any error, or miſtake. And if there is in his words any ambiguity, obſcurity, or other defect; they are to be interpreted againſt him [q].

[q] Veteribus placet, pactionem obſcuram, vel ambiguam, venditori, & qui locavit, nocere, in quorum fuit poteſtate, legem apertius conſcribere. *l.* 39. *ff. de pact. l.* 21. *l.* 33. *ff. de contr. empt.* See the thirteenth Article of the ſecond Section of Covenants; and the tenth Article of the third Section of Hiring and Letting to Hire.

XV.

15. *Deceit in the thing.*

He who has ſold one thing for another; an old thing for a new; a leſs quantity than what he mentioned; whether he was ignorant of the defect, or conſcious of it, is bound to take back the Thing, or to abate of the Price, and to make good the damages which the Buyer ſhall have ſuffered [r].

[r] Si veſtimenta interpola quis pro novis emerit, Trebatio placere ita emptori præſtandum quod intereſt, ſi ignorans interpola emerit. *l.* 45. *ff. de contr. empt.*

Venditor teneri debet, quanti intereſt non eſſe deceptum, etſi venditor quoque neſciat. Veluti ſi menſas quaſi citreas emat, quæ non ſunt. *l.* 21. §. 2. *ff. de act. empt. & vend.* In fundo vendito, cùm modus pronuntiatus deeſt, ſumitur portio ex pretio. *l.* 69. §. *ult. ff. de evict.*

XVI.

16. *Redhibition, becauſe of the defect of one of many things which ſort with one another.*

If of ſeveral things which match one another, ſuch as the pieces of a Sute of Hangings, Horſes belonging to one and the ſame Set, and other things of the like nature, one of them happens to have the defects which are ſufficient to diſſolve the Sale; it ſhall be diſſolved for the whole. For it is equally the intereſt both of Seller and Buyer, not to unmatch theſe kinds of things [s].

[s] Cùm jumenta paria veniunt, Edicto expreſſum eſt, ut cùm alterum in ea cauſa ſit, ut redhiberi debeat; Utrumque redhibeatur. In qua re tam emptori, quam venditori conſulitur, dum jumenta non ſeparantur. Simili modo, & ſi triga venierit, redhibenda erit tota, & ſi quadriga, redhibeatur. *l.* 38. §. *ult. ff. de edil. ed. l.* 34. *l.* 35. *eod.*

XVII.

17. *Redhibition does not take*

Redhibition, and diminution of the Price, becauſe of the defects of the thing

thing ſold, do not take place in publick Sales, which are made by a Decree of a Court of Juſtice. For in theſe Sales, it is not the Proprietor who ſells, but it is the Authority of Juſtice, which is in the place of the Seller, and which adjudges the thing only ſuch as it is [t].

Contract of Court.

[t] Illud ſciendum eſt, edictum hoc non pertinere ad venditiones fiſcales. *l.* 1. §. 3. *ff. de ædil. ed. Although this Law has no direct relation to this Article, yet it may be applied to it.*

XVIII.

18. The time for bringing an Action of Redhibition.

The time which the Buyer is allowed for bringing his Action of Redhibition, commences only after that the Buyer has been able to diſcover the defects of the thing ſold; unleſs this time were regulated by ſome Cuſtom, or that it has been agreed that the Buyer ſhould not bring his complaint, except within a certain time. But even in the caſe of a delay that is regulated, the Buyer may be received to make his complaint after that time is expired, and the Judge will decide in the matter according to the circumſtances [u].

[u] Si quid ita venierit, ut niſi placuerit, intra præfinitum tempus, redhibeatur; ea conventio rata habetur. Si autem de tempore nihil convenerit, in factum actio intra ſexaginta dies utiles, accommodatur emptori ad redhibendum, ultra non. Si verò convenerit ut in perpetuum redhibitio fiat, puto hanc conventionem valere. Item ſi tempus ſexaginta dierum, præfinitum redhibitioni præterierit, cauſa cognita judicium dabitur. *l.* 31. §. 22. *ff. de ed. ed.* See the eighth Article of the fourth Section; and the ninth Article of the twelfth Section.

SECT. XII.

Of other cauſes of the Diſſolution of Sales.

Divers cauſes of the Diſſolution of Sales.

SAles may be diſſolved for ſeveral cauſes.

By the Seller's failing to deliver the Thing ſold.

By the Buyer's failing to pay the Price.

On account of the defects of the Thing ſold.

On account of the lowneſs of the Price.

Becauſe of Evictions.

Becauſe of the event of a Condition.

By the Revocation which the Creditors of Sellers make of Sales made to defraud their Creditors.

By the power of Redemption veſted in the Heir of Line, which diſſolves the Sale with reſpect to the Buyer, and transfers it to the lineal Heir, who is ſubſtituted in the place of the Buyer.

By the Power of Redemption which Lords have in regard to their Feudal Lands, and others.

By a power of Redemption ſtipulated by Covenant.

By virtue of a conditional Agreement to diſſolve the Sale in caſe of a certain event.

By reaſon of the Non-performance of ſome of the Covenants ſtipulated in the Sale.

By the mutual conſent of Seller and Buyer.

By reaſon of Fraud, Force, Error, and the other grounds of Reſtitution, Reſciſſion, or Nullity.

Of all theſe Cauſes, the ſix firſt, and the laſt, which is that of Nullity, have been explained under this Title. The Revocation of Sales made to defraud Creditors, comes under the Title of things done to defraud Creditors. The power of Redemption veſted in the Heir of Line, and that which attends Feudal Lands, do not come properly within the deſign of this Work; for they are peculiar to our Cuſtoms, and the Power of Redemption belonging to the Heirs of Line is aboliſhed by the *Roman* Law *; Reſciſſions and Reſtitutions ſhall have their reſpective Titles in their proper places. And there remains only to be explained here, the Power of Redemption ſtipulated by Covenant, the conditional Agreement to diſſolve the Sale in caſe of a certain event, the Non-performance of the Covenants, and the Conſent of Buyer and Seller. But we muſt in the firſt place explain ſome Rules that are common to all the ways of diſſolving Sales.

* *L.* 14. *Cod. de contr. empt. v. l.* 16. *ff. de reb. auth. jud. poſſid.*

[This power of Redemption which the Heirs of Line had to redeem Lands that were alienated out of the Family, altho' it was aboliſhed by the *Roman* Emperors, as appears from the texts above quoted; yet it was afterwards revived under the Feudal Law, and is ſtill in force in moſt Countries, *England* excepted. *Vid. lib.* 5. *Feud. tit.* 13, 14, 15, 16. *Groenweg. in lib.* 4. *Cod. de contr. empt. l.* 14.]

Rules common to the Diſſolution of Sales.

The CONTENTS.

1. *Difference between the Nullity, and Diſſolution of a Sale.*
2. *The Poſſeſſor cannot be turned out of Poſſeſſion, but by the authority of Juſtice.*

3. *Damages,*

3. *Damages, if there is ground for any.*
4. *The Diſſolution of the Sale reſtores all things as they were.*
5. *The Seller is reinſtated in his Right.*
6. *Power of Redemption by Covenant.*
7. *Sale with the Power of Redemption, implies a Condition.*
8. *The Power of Redemption granted ſome time after the Contract is paſt.*
9. *The continuance of the Power of Redemption.*
10. *The Fruits after an Offer made to redeem.*
11. *Conditional Agreement to diſſolve the Sale.*
12. *Effect of theſe conditional Diſſolutions.*
13. *The Sale vacated altho' there be no Clauſe of Diſſolution.*
14. *Diſſolution of the Sale by conſent, before performance of Articles.*
15. *Diſſolution of the Sale by conſent, after performance of Articles.*

I.

1. *Difference between the Nullity and Diſſolution of a Sale.*

THere is this difference between the Diſſolution, and Nullity of a Sale, that the Nullity makes it to have been no Sale from the beginning[a]; and the Diſſolution makes the Sale to ceaſe which had been accompliſhed; but does not make it never to have been, even altho' it ſhould be diſſolved by the will of the Seller and Buyer[b].

[a] *See the firſt Article of the fifth Section of Covenants.*

[b] Ab emptione, venditione, locatione, conductione, cæteriſque ſimilibus obligationibus quin integris omnibus, conſenſu eorum qui inter ſe obligari ſunt, recedi poſſit, dubium non eſt. *l.* 58. *ff. de pact. l.* 1. *C. quando lic. ab empt. diſc. l.* 2. *eod.*

Infectam emptionem facere non poſſumus. *l.* 2. *in f. ff. de reſc. vend.* See on this and the following Articles, the ſixth Section of Covenants.

II.

2. *The Poſſeſſor cannot be turned out of Poſſeſſion, but by the Authority of Juſtice.*

Whatever be the cauſe of the Diſſolution of a Sale, if it is controverted, and that the Buyer, or any other perſon having his right, is in Poſſeſſion; the Seller cannot take back the thing ſold but by the Authority of Juſtice[c].

[c] *See the ſixteenth Article of the fifth Section, and the fifteenth Article of the ſixth Section of Covenants.*

III.

3. *Damages, if there is ground for any.*

If the Sale is vacated by the deed of one or t'other of the parties, who has been the occaſion of ſome damage; he ſhall be bound to make it good, purſuant to the Rules which have been explained in this Title[d].

[d] *This is a conſequence of ſeveral Rules which have been explained in this Title.*

IV.

4. *The Diſſolution of the Sale reſtores all things as they were.*

The Sale being diſſolved, the Seller and Buyer are reinſtated in their Rights; and all things are reſtored to the ſame condition they were in before the Sale, as far as the circumſtances will allow[e].

[e] Ut uterque, reſoluta emptione, nihil amplius conſequatur, quam non haberet, ſi venditio facta non eſſet. *l.* 23. §. 1. *ff. de ædil. ed. d. l.* §. 7. See the following Article.

V.

5. *The Seller is reinſtated in his Right.*

When the Sale is annulled, the Seller takes back that which he had ſold, without any of the Charges which the Buyer may have burthened it with. Becauſe the Seller is reinſtated in his Right, as if he had never been diveſted of it[f].

[f] Omnia in integrum reſtituuntur, perinde ac ſi neque emptio, neque venditio interceſſit. *l.* 60. *ff. de ed. ed.*

This Rule is underſtood only of the Charges to which the Buyer had ſubjected the thing by his own proper deed; as if he had ſubjected the Lands he had bought to a Quit-Rent, to a Service, if he had mortgaged them to his Creditors; and it does not concern the Fine of Alienation which belongs to the Lord of the Manor on account of the Sale. For this Charge of paying the Fine of Alienation was a conſequence of the Contract, which was as much the deed of the Seller, as of the Buyer. So that the Eſtate which was ſold, remains burden'd with it, if the Buyer did not pay it. But if the Sale was annulled for a cauſe which proceeded ſolely from the deed of the Seller, as if his Creditors ſeized upon the Lands which were ſold, it is juſt in this caſe that the Buyer be indemnified by the Seller, as to the Fine of Alienation which he has paid. There are even ſome Cuſtoms which give him the Fine of Alienation in the caſe of Eſtates ſold by a Decree of the Court, leaving the Lord at liberty to take the ſame, he reſtoring to the Purchaſer, the firſt Fine of Alienation he had received of him.

See upon this Article the fourteenth and fifteenth articles which follow. See the ſecond Article of the firſt Section, and the tenth Article of the ſecond Section, with the remarks made thereon.

Of the Power of Redemption by Covenant.

VI.

6. *Power of Redemption by Covenant.*

THE Power of Redemption by Covenant, is a Paction, by which it is agreed, that the Seller ſhall have the liberty to take back the thing ſold, he reſtoring the Price to the Buyer, or ſo much of it as has been paid[g].

[g] Si fundum parentes tui, ea lege vendiderunt, ut ſive ipſi, ſive hæredes eorum, emptori pretium quandocunque, vel intra certa tempora obtuliſſent, reſtitueretur, neque parato ſatisfacere conditioni directæ, lixeres emptoris non paret, ut contractus fides ſervetur, actio præſcriptis verbis, vel ex vendito, tibi dabitur. *l.* 2. *C. de pact. int. empt. & vend. comp. l.* 7. *eodem l.* 12. *ff. de præſc. verb. l.* 1. *C. Quando decr. non eſt op.*

VII.

7. *A Sale with the Power of Redemption, implies a Condition.*

A Sale with a Power of Redemption, implies a Condition, that the Sale ſhall be void, if the Seller buys the thing back again[h]. And when he does ſo, he enters again into his Right, by virtue of that condition. Thus, he takes back the Thing, free from the Charges to which the Buyer may have ſubjected it.

[h] (Si) ſoluta fuerit data quantitas, ſit res inempta. *l.* 7. *C. de pact. int. empt. & vend. comp.* te parato ſatisfacere conditioni, &c. *l.* 2. *eod.*

VIII.

8. *The Power of Redemption granted ſome time after the Contract is paſt.*

If the Power of Redemption was granted only after the Contract of Sale was finiſhed, it will be of no manner of prejudice to the Charges and Mortgages to which the Buyer may have ſubjected the thing after the Contract was paſt, and before he granted the Power of Redemption[i].

[i] *This is a neceſſary conſequence of the accompliſhment of the Sale which was pure and without condition, and which had transferred the Right to the Buyer, purſuant to the Rules of the Nature of the Contract of Sale.*

IX.

9. *The continuance of the Power of Redemption.*

The Power of Redemption may be granted, either indefinitely, without marking the time within which the Seller may redeem, or fixing a certain time, after which this Power of Redemption ſhall ceaſe[l]. If the Power is granted indefinitely, it laſts as long as the time limited for Preſcription[m]. If it is reſtrained to a certain time, the Seller is not immediately excluded when the time expires; but a delay is granted to him in the ſame manner as to the Buyer, when the Sale ought to be diſſolved for want of payment at the term[n].

[l] Si fundum parentes tui, ea lege vendiderunt, ut ſive ipſi, ſive hæredes eorum, emptori pretium quandocunque, vel intra certa tempora obtuliſſent, reſtitueretur, &c. *l.* 2. *C. de pact. inter empt. & vend. comp.*

[m] Hæ actiones annis triginta continuis extinguantur, quæ perpetuæ videbantur. *l.* 3. *C. de præſcr.* 30. *vel* 40. *ann.*

[n] *See the eighteenth Article of the foregoing Section, the eighth Article of the third Section, and the thirteenth Article of this Section.*

X.

10. *The Fruits after an Offer made to redeem.*

The Seller exerciſing his Power of Redemption of Lands which he had ſold, the Purchaſer ought to reſtore to him the Fruits from the day that he made his Demand, with a Tender of the Price in due form[o].

[o] Habita ratione eorum quæ poſt oblatam, ex pacto quantitatem, ex eo fundo ad adverſarium pervenerunt. *d. l.* 2. *C. de pact. int. empt. & vend. comp.*

Of the conditional Agreement to diſſolve the Sale, and of Non-performance.

XI.

11. *Conditional Agreement to diſſolve the Sale.*

THE Paction, or conditional Agreement to diſſolve the Sale, is that Covenant which is ſo uſual in Sales, that if the Buyer does not pay the Price at the time prefixed, the Sale ſhall be void[p]. And this ſame Penalty of the Diſſolution of the Sale, may be likewiſe ſtipulated in caſe of the Non-performance of any other Covenant that is part of the Contract of Sale. As if it is ſaid, that if a Houſe which is ſold, and declared to be free from a Service, ſhall appear to be ſubject to it, the Seller ſhall be bound to take it back again.

[p] Cùm venditor fundi in lege ita caverit, ſi ad diem, pecunia ſoluta non ſit, ut fundus inemptus ſit. *l.* 2. *ff. de leg. commiſſ.*

XII.

12. *Effect of theſe conditional Diſſolutions.*

The Clauſes for diſſolving the Sale, in caſe of Non-payment at the time appointed, or of Non-performance of any other Article of the Contract, have not the effect to diſſolve immediately the Sale, upon the failure of Performance; but a delay is granted for fulfilling what has been promiſed; unleſs the thing cannot admit of a delay; as if the Seller fails to deliver the Goods which he promiſed to have ready againſt the day of an Imbarkation[q].

[q] *See the eighth Article of the third Section, and the nineteenth Article of the ſecond Section.*

XIII.

13. *The Sale vacated, altho' there be no Clauſe of Diſſolution.*

Altho' there be no Clauſe of Diſſolution for Non-payment at the ſet time, or Non-performance of any other Article of the Contract, yet the Sale ſhall nevertheleſs be diſſolved, if the failure of Payment, and the Non-performance give occaſion for it, after the delays, according to the circumſtances[r]. For the Parties do not intend that the Contract ſhould ſubſiſt, unleſs each of them performs his Engagement[s].

[r] *See the ſecond and fourth Articles of the third Section of Covenants.*

Non impleta promiſſi fide, dominii tui jus in ſuam cauſam reverti conveniat. *l.* 6. *C. de pact. int. empt. & vend. compoſ.*

[s] *See the fifth Article of the firſt Section of Covenants.*

Of the Diſſolution of the Sale by the mutual Conſent of Seller and Buyer.

XIV.

14. *Diſſolution of the Sale by conſent, before performance of articles.*

IF the Seller and Buyer diſſolve the Sale, before the thing ſold has been delivered, and the Price paid, the Sale not being as yet conſummated, and all things being entire, both Parties are diſcharged from their Engagements; and are by mutual conſent reſtored to the ſame ſtate as if there had been no Sale[t].

[t] Poteſt, dum res integra eſt, conventione noſtra infecta fieri emptio. *l.* 2. *ff. de reſc. vend.* Si Titius & Sejus inter ſe conſenſerint, ut fundum Tuſculanum emptum Sejus haberet centum aureis: deinde re nondum ſecuta, id eſt, neque pretio ſoluto, neque fundo tradito, placuerit inter eos, ut diſcederetur ab emptione, & venditione, invicem liberantur. §. *ult. inſt. quibus modis tollitur oblig.* Ab emptione, venditione, locatione, conductione, cæteriſque ſimilibus obligationibus, quin integris omnibus, conſenſu eorum qui inter ſe obligati ſint, recedi poſſit, dubium non eſt. *l.* 58. *ff. de pact.* In emptione cæteriſque bonæ fidei judiciis, re nondum ſecuta, poſſe abiri ab emptione. *l.* 7. §. 6. *eod. l.* 1. *&* 2. *C. quando licet ab empt. diſcedere.*

See the following Article, and the ſecond Article of the firſt Section, and the tenth Article of the ſecond Section.

It is neceſſary to obſerve on this Article, that if the Contracters diſſolve the Sale of Lands, within a ſhort time after the Contract, and before the Purchaſer has taken poſſeſſion of them, it is but equitable, and likewiſe agreeable to Cuſtom, that there ſhould be no Fine of Alienation due on account of the ſaid Sale. And there are ſome Cuſtoms which give a certain time, ſuch as the ſpace of eight days, for diſſolving the Contract, before any Fine of Alienation be due. But ſeeing this time is not regulated in the other Provinces, and that a diſtinction may be made between the condition of a Purchaſer who has taken poſſeſſion, and of one who has not, there ariſes frequently different queſtions, whether the Fine of Alienation be due or not, according to the ſtate that things are in at the time of the Diſſolution of the Sale. And it were to be wiſhed, that there were a certain and uniform Rule for all theſe caſes; and likewiſe for the other caſes where ſuch Rules are wanting, as we have taken notice of in ſeveral places.

XV.

15. *Diſſolution of the Sale by conſent, after performance of articles.*

If the Sale being conſummated, the Price paid, the Thing delivered, and the Buyer in poſſeſſion, the Seller and Buyer agree afterwards to diſſolve the Contract, without any other cauſe than their bare will; it is not ſo much a Diſſolution of this Sale, as a ſecond Sale which the Buyer makes to the perſon who had ſold the thing to him. Thus, this firſt Seller does not take back a thing that is his own, ſince his Sale of it had diveſted him of his Right to it; but he buys in effect the thing belonging to another perſon; and it goes to him burdened with the charges and Mortgages, to which the perſon who bought the thing of him, and ſells it back to him again, may have ſubjected it in the mean while[u].

[u] Re quidem integra, ab emptione & venditione, utriuſque partis conſenſu recedi poteſt. Etenim quod conſenſu contractum eſt, contrariæ voluntatis adminiculo diſſolvitur. At enim poſt traditionem interpoſitam, nuda voluntas non reſolvit emptionem, ſi non actus quoque priori ſimilis retroagens venditionem interceſſerit. *l.* 1. *C. quando lic. ab empt. diſc.* Poſt pretium ſolutum infectam emptionem facere non poſſumus. *l.* 2. *ff. de reſc. vend.*

See the preceding Article, and the Remark that is there made on it; and the ſecond Article of the firſt Section, and the tenth Article of the ſecond Section.

SECT. XIII.

Of ſome Matters which have relation to the Contract of Sale.

Of Forced Sales.

Cauſes of forced Sales.

IT happens very often that things which belong to particular perſons, are found to be neceſſary for ſome publick Uſe: and if in theſe caſes they refuſe to ſell them, they are forced to it by the Authority of Juſtice. Becauſe that all things being made for the uſe of the Society, before any thing paſſes to the uſe of particular perſons; they poſſeſs them only upon this condition, that their private Intereſt ſhall give way to the publick Intereſt, in the neceſſities which may require it. Thus, a private man is bound to ſell his Lands, or Tenements, if they be found neceſſary for ſome Publick Work. And there are alſo other cauſes for which the Publick Juſtice obliges perſons to ſell their Poſſeſſions, and that even for the Intereſt of Private Perſons, as in the caſe of the fourth Article of this Section. We may obſerve in the *Roman* Law, concerning the ſubject of forced Sales, ſome ſingular caſes where the Proprietors were forced to ſell. Thus, by a Conſtitution of the Emperor *Antonin*, Maſters who uſed their Slaves ill, were obliged to ſell them[a]. Thus, when one of ſeveral Maſters of a Slave, who belonged in common to many, was willing to give him his Liberty, the other Maſters were forced to ſell him their Portions[b]. Thus, when a thing belonged in common to the Exchequer, and to private perſons, the Exchequer might of it ſelf ſell the whole thing, altho' the ſhare it had in it were never ſo ſmall, and the other Proprietors were obliged to part with their Shares to the Purchaſer, for their proportionable part of the Price agreed on[c].

[a] *V. §. 2. inſt. de his qui ſui vel al. jur. ſunt.*
[b] *L. 1. §. 1. C. de comm. ſerv. man. l. 16. ff. de Servitut.*
[c] *L. un. C. de vend. rer. fiſc. cum priv. comm. l. 2. C. de com. rer. alien.*

The CONTENTS.

1. *Forced Sales.*
2. *A forced Sale for the Publick Good.*
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4. *A forced Sale for a particular Neceſſity.*
5. *If the perſon who might be compelled, conſents to the Sale.*
6. *If he refuſes to ſell.*
7. *Effect of theſe kinds of Sales.*
8. *Fields lying near to the High Way.*
9. *Diſtreſſes and Sales by Decree of a Court of Juſtice.*
10. *Sale by Cant, or Auction.*
11. *Valuation.*

I.

2. *Forced Sales.*

FOrced Sales are thoſe to which perſons are compelled by Authority of Juſtice, for the Publick Good, or ſome other juſt cauſe [a].

[a] *See the following Articles.*

II.

2. *A forced Sale for the Publick Good.*

If a Houſe, or other Tenement, appears to be neceſſary for a Publick Uſe, ſuch as the building of a Pariſh Church, or enlarging it, to make a Church-yard, for making a Street, or enlarging it, for making any Fortification, or other Work, for the Publick Conveniency; the Proprietor is compelled by Publick Authority to ſell the ſaid Houſe, or Tenement, at a reaſonable Price [b].

[b] *This is a conſequence of what has been remarked in the beginning of this Section.* V. l. 11. ff. de evict. in verbo, *Poſſeſſiones ex præcepto principali diſtractas.* Poſſeſſiones quas pro Eccleſiis, aut domibus Eccleſiarum parochialium de novo fundandis, aut ampliandis, infra villas, non ad ſuperfluitatem, ſed convenientem neceſſitatem acquiri contingat, de cætero apud Eccleſias remaneant, abſque coactione vendendi, vel extra manum ipſarum ponendi. Et poſſeſſores illarum poſſeſſionum ad eas dimittendum juſto pretio compellantur. Pro Eccleſiis parochialibus, cœmeteriis, & domibus parochialibus Rectorum extra villam fundandis vel applicandis, illud idem concedimus. *Ordinance of* Philip the Fair *of the Year* 1303.

See an Example of the uſe of a Ground belonging to a private man, for the Publick conveniency, and for the wants of particular perſons, in the thirteenth Law, §. 1. ff. com. præd. tam urban. quam ruſtic. where it is ſaid, that a private Man who has a Quarry in his Ground, is not obliged to ſell the Stone he digs out of it, unleſs he be bound by a Cuſtom to give Stone out of his Quarry at a certain Price to thoſe who demand it. But if it were in a place where the uſe of this Quarry were neceſſary to the Publick, would it not be juſt to oblige the Proprietor to give the Stone at a reaſonable Price, altho' no ſuch Uſage were eſtabliſhed?

III.

3. *Sale of Proviſions.*

In the caſe of a Publick Neceſſity, and at a time when there is a great ſcarcity of Corn, ſuch perſons as have great plenty of it by them, are compelled to ſell it at a reaſonable Price [c]. And the Civil Policy obliges Butchers and Bakers to ſell their Goods likewiſe at a reaſonable Rate [d].

[c] Lege Julia de annona, pœna ſtatuitur adverſus eum, qui contra annonam fecerit. *l. 2. ff. de leg. Jul. de ann.* Præterea debebis cuſtodire, ne Dardanarii ullius mercis ſint, ne aut ab his qui coemptas merces ſupprimunt, aut à locupletioribus: qui fructus ſuos æquis pretiis vendere nollent, dum minus uberes proventus expectant, ne annona oneretur *l. 6. ff. de extraord. crim.*

[d] Cura carnis omnis, ut juſto pretio præbeatur, ad curam Præfecturæ pertinet. *l. 1. §. 11. ff. de off. præf. urb. There are ſeveral Ordinances on this Subject.*

IV.

4. *A forced Sale for a particular Neceſſity.*

If the ſituation of two Fields happen to be ſuch, that there is no going to the one without paſſing through the other; the Proprietor of the Field thro' which it is neceſſary to paſs, is obliged to ſell this Service, in the place which will be the leaſt inconvenient for him [e]. For it is not reaſonable that the other Field ſhould remain altogether uſeleſs.

[e] Si quis ſepulchrum habeat, viam autem ad ſepulchrum non habeat, & à vicino ire prohibeatur: Imperator Antoninus cum patre reſcripſit: iter ad ſepulchrum peti precario, & concedi ſolere. *l. 12. ff. de Relig.* Præſes etiam compellere debet, juſto pretio iter ei præſtari. Ita tamen ut judex etiam de opportunitate loci proſpiciat, ne vicinus magnum patiatur detrimentum. *d. l.*

V.

5. *If the perſon who might be compelled, conſents to the Sale.*

If in the caſe where the Proprietor of a Field may be forced to ſell it, he conſents voluntarily to the Sale; this will be a Covenant, of which the conditions will be ſuch as the Parties ſhall have regulated them by common conſent in the Contract [f].

[f] *It will be a voluntary Agreement that regulates the conditions of this Sale.* See the ſeventh Article of the ſecond Section of Covenants.

VI.

6. *If he refuſes to ſell.*

If the Proprietor refuſes to ſell, and ſuffers himſelf to be forced to it by a Court of Juſtice, the Sentence or Decree which ſhall be pronounced againſt him, ſhall be in the place of a Sale, and of a Title of Alienation, which ſhall diveſt this Proprietor of his Right, and tranſfer the Land or Tenement to the uſe for which it is deſtined [g].

[g] *This is a neceſſary conſequence of theſe kinds of Sales.*

VII.

7. *Effects of these kinds of Sales.* In the cases where the Proprietor is divested of his Land or Tenement for some Publick Use, he cannot be obliged to any Warranty. For besides that he is divested of it against his Will, the Land or Tenement being put out of Commerce by this Change, it is not any longer subject to Mortgages, nor to Evictions. But the Purchasers, such as Church-wardens, or the Corporation of a Town, remain bound to the Lord of the Mannor, for the Rights which he had upon the said Lands; and they are to indemnify him as to the consequences of this change, according to the quality of his Rights, and the Customs of the Places. And the Creditors of the person who is divested of his Land, or Tenement, have their Right upon the Price [h].

[h] *These are likewise necessary consequences of these kinds of Sales.*

VIII.

8. *Fields lying near to the High Way.* If by any accident, such as a Flood, a High Way is taken off, or rendred impracticable; the Proprietors of the adjacent Fields are bound to furnish a High Way, but without having power to sell what they lose by that means [i]. For it is a casualty which turns their Fields, or a part of them, into a High Way; and this situation of their Lands engaged them to suffer this event.

[i] Cùm via publica, vel fluminis impetu, vel ruina, amissa est, vicinus proximus viam præstare debet. *l.* 14. *in f. ff. quemadm. serv. amitt.*

This Rule is to be understood of an ancient High Way. But if for the Publick Convenience a way were changed, to make it shorter, or to make a way altogether new, it would be necessary to indemnify the particular persons for the share of their Grounds that goes to the making of this new Way.

Of Sales by Decree of a Court of Justice.

IX.

9. *Distresses and Sales by Decree of a Court of Justice.* CReditors have a right to demand that the Goods of their Debtors be exposed to Sale; and these sorts of Sales are forced, and are made by a Decree of a Court of Justice [k].

[k] *See the ninth Article of the third Section of Mortgages.*

I do not enter here into a particular discussion of this matter, of Sales by Decree, which being a part of the Order of Judicial Proceedings, and being different in our Practice from what it was among the Romans, *it does not properly belong to this Collection.* V. l. ult. C. de jure dom.

Of Sale by Cant or Auction.

X.

10. *Sale by Cant, or Auction.* WHen a thing, which cannot be divided without great difficulty, such as a House, or which cannot be divided at all, such as a Judicial Office, belongs in common to several persons, and that they either cannot, or will not agree among themselves about it; they sell it, in order to divide the Price of it among them; and they give it to the highest bidder, either among themselves, or strangers whom they admit to bid for it. And this way of Sale is called Cant or Auction [m].

[m] *V. l.* 78. §. 4. *ff. de jur. dot.* in verbo, *adjudicatusque fundus socio fuerit*; & in verbo, *licitatione. l.* 13. §. 17. *ff. de act. empt. & vend. l.* 7. §. 13. *ff. comm. divid. l.* 3. *C. eod.*

Of Valuation.

XI.

11. *Valuation.* It often happens that many things having been sold by the Lump together, for one Sum, without distinguishing the Price of each, it becomes necessary afterwards to know the Price of each particular; and to regulate how much every one of the things may be worth upon the foot of the Price that was given for the whole. And this way of making an Estimate, is what is called Valuation. Thus, for Example, if one of several Lands that were sold for one and the same Price, happens to be subject to a Fine of Alienation, it is by a Valuation that this Fine is regulated. And it would be the same thing, if it were necessary to make a particular Estimate of a portion of a House, or other Estate [n].

[n] *V. l.* 1. *ff. de exhib. l.* 72. *eod.*

TITLE III.

Of EXCHANGE.

Exchange being ancienter than Sale, why placed after it. ALtho' the use of Exchange did naturally precede that of Sale [a], which had its beginning only with the Invention of Coin; yet order did require that we should explain the Rules of the Contract of Sale, before we should say any thing of Exchange, for the reasons which have been remarked at the end of the Plan of the Matters treated of in this Book.

[a] Origo emendi vendendique à permutationibus cœpit. *l.* 1. *ff. de contr. empt.*

Exchange the first Commerce for acquiring the Property of Things. Exchange has been the first Commerce which men made use of to acquire the Property of Things; the one party giving to the other what was either useless, or less necessary to himself, that he might get from the other a thing which he stood in need of [b].

[b] Unus-

[b] Unuſquiſque ſecundùm neceſſitatem temporum ac rerùm utilibus inutilia permutabat. *l. 1. ff. de contr. empt.*

Particular Rules of the Roman Law as to Exchange.

Altho' the uſe of Exchange be wholly Natural, yet this Contract had in the *Roman* Law Rules which ſeem not to be very Natural in our Practice. For Exchange was conſidered in the *Roman* Law as a Contract without form, which was placed among thoſe Contracts which have no particular Name; the effect of which was, that when there was only a ſimple Contract of Exchange, without delivery on one ſide or t'other; it produced no right to demand the execution of the Contract[c]; and when delivery was made only by one party, he who had made it, had no right to demand that which the other party was bound to give him in counterchange, and he could only take back the thing which he had given[d]. But ſince it is Natural, and agreeable to our Practice, that all Covenants ſhould be performed[e]; we give to this Contract its intire perfection. And the parties who have bound themſelves in the Contract, are compelled mutually to execute it, in the ſame manner as in the Contract of Sale; and as they were likewiſe compelled in the *Roman* Law, when the Exchange was attended with a Stipulation[f].

[c] Ex placito permutationis, nulla re ſecuta, conſtat nemini actionem competere. *l. 3. C. de rer. perm.* Emptio ac venditio nuda conſentientium voluntate contrahitur, permutatio autem ex re tradita initium obligationi præbet. Alioquin ſi res nondum tradita ſit, nudo conſenſu conſtitui obligationem dicemus. Quod in his dumtaxat receptum eſt, quæ nomen ſuum habent, ut in emptione, venditione, conductione, mandato. *l. 1. §. 2. ff. de rer. perm.*

[d] Ex altera parte traditione facta, ſi alter rem nolit tradere, non in hoc agimus, ut intereſt noſtra illam rem accepiſſe, de qua convenit, ſed ut res contra nobis reddatur, condictioni locus eſt, quaſi re non ſecuta. *l. 1. § ult. ff. de rer. perm. l. 5. l. 7. C. tod.*

[e] Quid tam congruum fidei humanæ quàm ea quæ inter eos placuerunt ſervare. *l. 1. ff. de pact.*

[f] Ex placito permutationis nulla re ſecuta, conſtat nemini actionem competere, niſi ſtipulatio ſubjecta ex verborum obligatione quæſierit partibus actionem. *l. 3. C. de rer. perm. l. 33. C. de tranſ.*

The Rules of Sales ſerve for Exchange.

All the matters relating to Exchange, being almoſt the ſame with thoſe belonging to the Contract of Sale, becauſe of the Affinity between theſe two Contracts, we ſhall repeat nothing here of what has been ſaid in the Contract of Sale; it being ſufficient to advertiſe the Reader, that we may apply to the Contract of Exchange, all the Rules of Sales, except thoſe which have no relation to it; ſuch as the Rules concerning the Price; becauſe in Exchange there is no Price. Thus, the Rules touching the Engagement of the Buyer to pay the Price, thoſe relating to the Power of Redemption, and others of the like nature, are not applicable to Exchange. But the Rules touching Delivery, thoſe concerning Warranty, with the other Engagements of the Seller; thoſe relating to the changes of the thing ſold, the Nullities of Sales, Eviction, Redhibition, and others of the ſame kind, are Rules common to Sales and to Exchanges. So that it will ſuffice to ſet down here, as Rules peculiar to Exchange, thoſe which follow.

Exception.

[g] Quoniam permutatio vicina eſſet emptioni, *l. ult. de rer. perm.* Permutationem, utpote re ipſâ bonæ fidei conſtituram, ſicut commemoras, vicem emptionis obtinere non eſt juris incogniti. *l. 2. C. de rer. perm.*

The CONTENTS.

1. *Definition of Exchange.*
2. *In Exchange both the one and the other hold the place of Seller and Buyer.*
3. *Eviction in Exchange.*
4. *Rules of Exchange the ſame with thoſe of Sale.*

I.

1. *Definition of Exchange.*

EXchange is a Covenant, by which the Contracters give to one another one Thing for another[a], whatever it be, except Money; for in that caſe it would be a Sale[b].

[a] Si ego togam dedi ut tunicam acciperem, Sabinus & Caſſius eſſe emptionem & venditionem putant: Nerva & Proculus permutationem, non emptionem hoc eſſe ——ſed verior eſt Nervæ & Proculi ſententia. *l. 2. §. 1. ff. de contr. empt.*

[b] Si quidem pecuniam dem, ut rem accipiam, emptio & venditio eſt. Sin autem rem do, ut rem accipiam, quia non placet permutationem rerum emptionem eſſe, &c. *l. 5. §. 1. ff. de præſc. verb.*

II.

2. *In Exchange both the one and the other hold the place of Seller and Buyer.*

In the Contract of Exchange, the condition of the Contracters being equal, in ſo much as both the one and the other give one Thing for another; we cannot in it make a diſtinction of a Seller and a Buyer, no more than of a Price and a Merchandize[c]. But both one and the other hold the place at the ſame time, both of Seller of the thing which he gives, and of Buyer of that which he receives[d].

[c] In permutatione diſcerni non poteſt, uter emptor, uter venditor ſit. *l. 1. §. 1. in f. ff. de contr. empt. l. 1. ff. de rer. perm.*

Neque aliud merx, aliud pretium. *l. 1. in princ. de contr. empt.*

[d] Si

[d] Si quis permutaverit, dicendum eſt utrumque emptoris, & venditoris loco haberi. *l.* 19. §. 5. *ff. de ædil. ed.* Is qui rem permutatam accepit, emptori ſimilis eſt. *l. ult. ff. quib. ex cauſ. in poſſ. eatur.*

III.

3. *Eviction in Exchange.*

If he who has taken a thing in Exchange is evicted of it, he holds the place of Buyer; and has his Recourſe for Warranty. And the other is bound to indemnify him againſt the Eviction, in the ſame manner as a Seller is [e].

[e] Si ea res quam acceperim, vel dederim, poſtea evincatur, in factum dandam actionem reſpondetur. *l.* 1. *ff. de rer. perm.* Ad exemplum ex empto actionis. *l.* 1. *C. eod.*

IV.

4. *Rules of Exchange the ſame with thoſe of Sale.*

All the Rules of the Contract of Sale take place in Exchange, except thoſe which appear not to be of the nature of this Contract, ſuch as the Rules concerning the payment of the Price [f].

[f] Permutationem utpote reipſa bonæ fidei conſtitutam ſicut commemoras, vicem emptionis obtinere, non eſt juris incogniti. *l.* 2. *C. de rer. perm.* Quoniam permutatio vicina eſſet emptioni. *l.* 2. *ff. eod.*

TITLE IV.

Of HIRING, and LETTING to Hire, and of the ſeveral kinds of LEASES.

The Matters of this Title.

THIS Title contains the Commerce uſed among Men, for communicating to one another the uſe of Things, or of their Induſtry, and Labour, for a certain Price. This Covenant is of a moſt neceſſary and moſt frequent uſe. For ſince it is not poſſible, that all Men ſhould have in their own property all the things which they ſtand in need of, nor that every one ſhould do that himſelf which cannot be had without Induſtry, and without Labour, and that it would not be juſt that the uſe of the Things of others, or of their Induſtry and Labour, ſhould be always gratuitous; it has therefore been found neceſſary to make a Traffick of all theſe things. Thus, he who has a Houſe which he does not inhabit himſelf, gives the uſe of it to another for a certain Rent. Thus, people hire Horſes, Coaches, Hangings, and other Moveables. Thus, Lands are farmed out to Tenants; or Labourers are hired to till them. Thus, people make a Traffick of their Induſtry, and their Labour, either by the great, or at the rate of ſo much a day, or by other bargains.

All theſe kinds of Covenants have this in common, that in every one of them, the one party enjoys the Thing belonging to another, or uſes his Labour for a certain Price: and it is for this reaſon, that in the *Roman* Law they are all of them compriſed under the Names of Letting and Hiring. Letting on the ſide of one of the Parties, who is called the *Leſſor*; and Hiring on the ſide of the other party, who is called the *Leſſee*. And here it is neceſſary to remark, that whereas in the Letting of Things, the Leſſor is he who gives the Thing, and the Leſſee is he who takes it; but in the Letting of Labour, the Leſſor is he who gives a Work to be done; and the perſon who undertakes the Work, and who gives his Labour and Induſtry, is called the Undertaker.

It is to theſe ſeveral ſorts of Covenants that we give the general name of Leaſe, ſuch as the Leaſe of a Houſe, the Leaſe of a Farm, a Leaſe of Work to be done, either at the rate of ſo much for every day's work, or by the great; becauſe in all theſe Covenants the one party gives to the other either a thing to be enjoyed, or a work to be done.

Altho' the Name of Letting and Hiring be common in the *Roman* Law to all theſe ſorts of Engagements, and that we have comprehended under one and the ſame Title, and without diſtinction, Leaſes of Houſes, and Moveables, and Farms, as alſo the Undertakings of a Building, or any other Work, with the other Covenants of this kind; yet we have thought it proper to diſtinguiſh between the Letting to Hire a Houſe, a Horſe, or any other thing, and the Leaſe of a Farm, and the Undertakings of any piece of Work at a price agreed on. For theſe matters are not only diſtinguiſhed by their Names, but they have likewiſe ſome differences in their Nature, and in their Rules. And becauſe they have all of them ſome Characters, and ſome Rules which are common to them all; we ſhall explain in the firſt Section, under the name of Letting and Hiring in general, thoſe characters which belong to them in common; and in the ſame Section, and the two following, we ſhall likewiſe gather together many of thoſe common Rules; and in the following Sections we ſhall explain what is particular in the Leaſes of Farms, and in the other kinds of Leaſes.

All theſe matters ſhall be contained in nine Sections, to which we have added a tenth, which treats of Emphyteutical Leaſes, or Leaſes for perpetuity, which are of a different Nature, and have different Rules from the uſual Leaſes of Farms, by which the Enjoyment of the Lands is granted only for a certain time.

SECT. I.

Of the Nature of LETTING *and* HIRING.

The CONTENTS.

1. *Definition of Letting and Hiring in general.*
2. *Who is the Leſſor, and who the Leſſee.*
3. *Letting and Hiring is accompliſhed by the bare conſent.*
4. *What things may be let.*
5. *The profits of Animals.*
6. *The letting of a thing which is not one's own.*
7. *The Rent, or Hire in Money, or a Portion of the Fruits.*
8. *The Lowneſs of the Rent not conſidered in Leaſes.*
9. *Liberty to let to others what we our ſelves have a Leaſe of.*
10. *Leaſes go to Heirs, or Executors.*

I.

1. *Definition of Letting and Hiring in general.*

LEtting and Hiring in general, including therein all kinds of Leaſes and Undertakings of any Work, is a Contract by which one Party gives to the other the Enjoyment or Uſe of a Thing [a], or of his Labour [b], during a limited time, for a certain Rent, or Hire [c].

[b] *Tot. tit. ff. locat. cond.* Si rem aliquam utendam ſive fruendam tibi aliquis dederit. §. 2. *inſt. de locat. & cond.*

[b] Quoties faciendum aliquid datur, locatio eſt. *l.* 22. §. 1. *ff. locat.*

[c] Locatio & conductio ita contrahi intelligitur, ſi merces conſtituta ſit. *inſt. eod. l.* 2. *ff. eod.*

We do not comprehend under this Definition the Emphyteutical Leaſes, or Leaſes for perpetuity; becauſe they have their peculiar Nature, which ſhall be explained in the tenth Section.

II.

2. *Who is the Leſſor, and who the Leſſee.*

He who gives a Thing to be enjoyed, is called the *Leſſor* [d], and the ſame name is given to him who gives out any Piece of Work to be done [e]. He who has the enjoyment of any Thing by hiring it, or taking a Leaſe of it, is called the *Leſſee* [f]; [illegible] who undertakes the doing of [illegible] Work [g], who is likewiſe called *Undertaker*. But in the Letting out of Labour and Induſtry, or in Undertaking of any Work by the great, or at the rate of ſo much a day, or ſo much a meaſure, the Workmen, or Undertakers, are likewiſe in ſome ſenſe to be accounted Leſſors; for they let out and give their Labour and Induſtry [h].

[d] Si quis fundum locaverit. *l.* 9. §. 2. *ff. locat. l.* 19. §. 2. *eod.*

[e] Quoties faciendum aliquid datur, locatio eſt. *l.* 22. §. 1. *ff. locat. l.* 36. *eod.*

[f] Licet certis annuis quantitatibus fundum conduxeris. *l.* 8. *C. de locato.*

[g] Adversùs eos à quibus extruenda ædificia conduxiſti, ex conducto actione contendes. *l.* 2. *C. de locato.*

[h] Locat artifex operam ſuam, id eſt, faciendi neceſſitatem. *l.* 22. §. 2. *ff. loc.*

III.

3. *Letting and Hiring is accompliſhed by the bare conſent.*

This Contract is of the number of thoſe which are accompliſhed by the bare conſent, in the ſame manner as the Contract of Sale; and theſe two Contracts have a great affinity one to the other, and many Rules which are common to both [i].

[i] (Locatio) conſenſu contrahitur. *l.* 1. *ff. locat. cond.* Locatio & conductio proxima eſt emptioni & venditioni, iiſdemque juris regulis conſtat. Nam ut emptio & venditio ita contrahitur, ſi de pretio convenerit, ſic & locatio & conductio contrahi intelligitur, ſi de mercede convenerit. *inſt. l.* 2. *ff. eod. de loc. & cond.* Adeò autem familiaritatem aliquam habere videntur emptio & venditio, item locatio & conductio: ut in quibuſdam quæri ſoleat, utrum emptio & venditio ſit, an locatio, & conductio. *d. l.* 2. §. 1. §. 3. *Inſt. eod.*

The Contract of Hiring and Letting is, as the Contract of Sale, accompliſhed by the bare conſent, when the Parties are agreed as to the Thing that is to be given to be enjoyed, or the Work that is to be done, and as to the Rent or Hire. And it is in this reſpect that this Contract reſembles the Contract of Sale, both the one and the other having a Price, and a Merchandiſe; from whence it happens that in ſome Bargains, it is doubtful whether they be a Letting and Hiring, or a Sale. As, for inſtance, when one makes a Bargain with a Goldſmith, that he ſhall do ſome piece of Work, and ſhall furniſh the Silver, as well as the Faſhion: This Bargain ſeems to belong to the Contract of Letting and Hiring, altho' in effect it be a Sale. Item quæritur, ſi cum Aurifice Titius convenerit, ut is ex auro ſuo certi ponderis, certæque formæ annulos ei faceret, & acciperet verbi gratia decem aureos; utrum emptio, an locatio & conductio contrahi videatur? Caſſius ait, materiæ quidem emptionem & venditionem contrahi, operæ autem locationem & conductionem. Sed placuit tantùm emptionem & venditionem contrahi. §. 4. *Inſt. de locat. & cond. As to the Rules which belong in common to Sale, and to the Contract of Letting and Hiring, it is eaſie to judge of them by the bare reading of this and the foregoing Title.*

IV.

4. *What things may be let.*

We may let to Hire all Things which the Hirer can reſtore back to the Letter, after he has enjoyed them [l]. From whence it follows, that we cannot let to Hire, no more than we can lend, ſo as to have back

back the thing lent in ſpecie; ſuch Things as are conſumed by the uſe of them; ſuch as Corn, Wine, Oil, and other Proviſions[m].

[l] *This is a conſequence of the Definition of Letting and Hiring.*

[m] Non poteſt commodari id quod uſu conſumitur. *l.* 3. §. *ult ff. commod.*

See the ſixth Article of the firſt Section of the Loan of Things to be reſtored in ſpecie.

V.

5. *The profits of Animals.*

Animals which produce any Revenue, or Profit, ſuch as Sheep, which yield Wool, Lambs, and Manure for Lands, and other Animals of the like kind, may be in a manner let to Hire to one who undertakes to keep them, and to feed them, for a certain Portion that is allotted him out of the Profits that ariſe from the ſaid Animals, provided the Agreement have nothing in it that is Uſurious, by reaſon of the exceſſive Profit reſerved to the Owner.

[n] Si paſcenda pecora partiaria (id eſt ut fœtus eorum portionibus quibus placuit inter dominum & paſtorem dividantur) Apollinarem ſuſcepiſſe probabitur, fidem pacto præſtare per judicem compellatur. *l.* 8. *C. de paſt.*

VI.

6. *The letting of a thing which is not one's own.*

We may let, as well as ſell, a Thing which belongs to another Perſon. Thus, he who poſſeſſes honeſtly a Thing of which he believes himſelf to be the true Owner, altho' he is not; and he who has a right to the Uſe and Profits of a Thing, without being Maſter of it, as the Uſufructuary, may let and farm out what they poſſeſs in this manner[o].

[o] Si tibi alienam inſulam locavero. *l.* 7. *ff. loc.* Si fructuarius locaverit fundum. *l.* 9. §. 1. *ff. eod.* See the twelfth Article of the fourth Section of the Contract of Sale.

VII.

7. *The Rent, or Hire, in Money, or a Portion of the Fruits.*

The Rent, or Hire, of what is let out, may be regulated, either in Money, as it is in Sales, or in a certain Quantity of Proviſions, or in a Portion of the Fruits[p].

[p] Si olei certa ponderatione fructus anni locaſti. *l.* 21. *C. de locato.* Colonus qui ad pecuniam numeratam conduxit, & colonus partiarius. *l.* 25. §. 6. *ff. eod.*

VIII.

8. *The Lowneſs of the Rent not conſidered in Leaſes.*

The Lowneſs of the Rent is not conſidered in Leaſes, as the Lowneſs of the Price is in Sales, in order to vacate them; unleſs it were attended with other circumſtances, ſuch as Fraud, or ſome Error. For Leaſes are not Alienations, as Sales are. And beſides, the uncertainty of the Value of the Profits for the time to come may juſtify the Agreement between the Proprietor and Farmer, in fixing a Rent certain, inſtead of that Value which is uncertain[q].

[q] Prætextu minoris penſionis, locatione facta, ſi nullus dolus adverſarii probari poſſit, reſcindi locatio non poteſt. *l.* 53. *ff. loc.*

Si decem tibi locem fundum, tu autem exiſtimes quinque te conducere, nihil agitur. *l.* 52. *ff. eod.* See the tenth Article of the fifth Section of Covenants, and the eleventh Article of the eighth Section of the Contract of Sale.

IX.

9. *Liberty to let to others what we our ſelves have a Leaſe of.*

He who has a Leaſe of a Houſe, or Farm, may let it out to others, unleſs it has been otherwiſe agreed upon[r].

[r] Nemo prohibetur rem, quam conduxit, fruendam alii locare, ſi nihil aliud convenit. *l.* 6. *C. de loc. l.* 60. *ff. eod.*

X.

10. *Leaſes go to Heirs, or Executors.*

The Engagements which are formed by the Contract of Letting and Hiring, paſs to the Heirs or Executors of the Leſſor, and to thoſe of the Leſſee[s].

[s] Ex conducto actionem etiam ad hæredem tranſire palam eſt. *l.* 19. §. 8. *ff. loc. l.* 10. *l.* 29. *l.* 34. *C. eod.*

[*In the Tranſlation of this Article, I have joined the word* Executors *to that of* Heirs; *becauſe the Law of* England *makes a diſtinction in Leaſes, ſome of which deſcend to the* Heir, *and ſome to the* Executor. *Leaſes for Life are of the nature of Freeholds, and therefore deſcend to the* Heir. *Leaſes for Years are Chattels, and go to the* Executor. Terms of Law, verb. Leaſe. Doctor and Student, lib. 1. ch. 7. & ch. 24.]

SECT. II.

Of the Engagements of the Leſſee.

The CONTENTS.

1. *Engagements of the Leſſee.*
2. *How the thing which is hired ought to be uſed.*
3. *Of him who miſuſes the Thing.*
4. *What care he is obliged to who has taken a thing to Hire.*
5. *He who takes a thing to hire, is accountable for the deed of the perſons for whom he ought to anſwer.*
6. *Of the damage done by an Enemy of the perſon who has hired the thing.*
7. *Of the Leſſee who quits Poſſeſſion for fear of ſome danger.*
8. *If the Tenant leaves his Houſe, or the Farmer his Farm.*
9. *Repairs.*
10. *If the Tenant abſconds.*
11. *The*

11. *The Leaſe being out, he who hired the Thing, ought to give it back, and pay the Rent, or Hire.*
12. *The Moveables of the Leſſee that are mortgaged for the Rent.*
13. *The Owner may turn out the Tenant, if he wants the Houſe himſelf.*
14. *If the Owner wants to repair the Houſe.*
15. *The Tenant may be turned out for Non-payment of his Rent.*
16. *The Tenant may be turned out, if he make a bad uſe of the Houſe.*
17. *Intereſt of the Rent, or Hire.*

I.

1. *Engagements of the Leſſee.*

THE Engagements of the perſon who takes any thing to Hire, are to put the thing to no other uſe than that for which it is hired; to uſe it well; to take care of it; to reſtore it at the time appointed; to pay the Rent or Hire; and in general he ought to obſerve whatever is preſcribed by the Covenant, by Law, and by Cuſtom [a].

[a] *Theſe Engagements ſhall be explained in the Articles which follow.* See the firſt Article of the third Section of Covenants.

II.

2. *How the thing which is hired ought to be uſed.*

He who takes a thing to Hire, cannot put it to any other uſe than that for which it is given him, nor uſe it in any other manner than what is agreed upon: and if he does otherwiſe, he ſhall be bound to make good the Damage that follows thereupon. Thus, he who hires a Horſe to ride on, cannot make uſe of him for a Pack-horſe. Thus, the Tenant of a Houſe, who is tied up by his Leaſe not to make a Fire, or not to put Hay in a certain place, cannot do any of theſe things; and if he does, and there happens a Fire, he ſhall be liable for Damages, altho' the Fire were occaſioned only by ſome accident; for it is the Tenant's fault that has given occaſion to this accident [b].

[b] Si hoc in locatione convenit ignem ne habeto, & habuit, tenebitur: etiam ſi fortuitus caſus admiſit incendium, quia non debuit ignem habere. *l.* 11. §. 1. *ff. loc.* Inter conductorem & locatorem convenerat, ne in villa urbana fœnum componeretur: compoſuit, deinde ſervus igne illato ſuccendit. Ait Labeo, teneri conductorem ex locato: quia ipſe cauſam præbuit, inferendo contra conductionem. *d. l.* 11. §. *ult. v. l.* 13. §. 2. *& l.* 18. *ff. commod.* See the tenth Article of the ſecond Section of the Loan of Things to be reſtored in ſpecie.

III.

3. *Of him who miſuſes the Thing.*

He who has taken a thing to Hire, is obliged to uſe it well and carefully, as a good Maſter would do, and neither to do, nor ſuffer any thing to be done, which may be of prejudice to the perſon who lets it out. Thus, the Tenant of a Houſe ought not to ſuffer the Uſurpation of a Service which is not due. Thus, he who has hired Beaſts of Burden, ought not to load them exceſſively; and if he does it, or miſuſes in any other manner of way the thing hired, he ſhall be anſwerable for it [c].

[c] Proſpicere debet conductor, ne aliquo vel jus rei, vel corpus deterius faciat, vel fieri patiatur. *l.* 11. §. 2. *ff. loc.* Qui mulas ad certum pondus oneris locaret, cùm majore onere conductor eas rupiſſet——vel ex lege aquilia, vel ex locato rectè eum agere. *l.* 30. §. 2. *ff. eod.*

IV.

4. *What care he is obliged to who has taken a Thing to Hire.*

Seeing he who takes a thing to Hire, uſes it for his own behoof; he ought to take care to keep it, and to preſerve it: and he is accountable not only for the Damage which may happen thro' his Knavery, or thro' any groſs Fault of his which comes near to it; but likewiſe for the Damage which may be occaſioned by other Faults, which any careful and diligent Man would not readily fall into. But if without his Fault, the thing periſhes, or is damaged by ſome accident, he is not bound to make it good [d].

[d] In judicio tam locati, quàm conducti dolum & cuſtodiam, non etiam caſum, cui reſiſti non poteſt, venire conſtat. *l.* 23. *C. de loc. l.* 9. §. 4. *ff. eod.* Dolum & culpam recipit locatum. *l.* 23. *ff. de reg. jur.* Ubi utriuſque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in ſocietate, & dolus & culpa præſtatur. *l.* 5. §. 2. *ff. commod. l.* 1. §. 10. *ff. d. pof.* See the twenty fourth Article of the ſecond Section of the Contract of Sale.

V.

5. *He who takes a thing to Hire, is accountable for the deed of the perſons for whom he ought to anſwer.*

He who takes the Thing to Hire, is bound not only for his own deed, but likewiſe for the deed of the perſons for whom he ought to be anſwerable. As if a Tenant of a Houſe has put in a Tenant under him; or if he has kept Servants in it, and they by their careleſneſs have ſet the Houſe on Fire [e].

[e] Videamus, an & ſervorum culpam, & quoſcunque induxerit, præſtare conductor debeat; & quatenus præſtat. Utrum ut ſervos noxæ dedat, an verò ſuo nomine teneatur; & adverſus eos, quos induxerit, utrum præſtabit tantùm actiones, an quaſi ob propriam culpam tenebitur. Mihi ita placet, ut culpam etiam eorum quos induxit, præſtet ſuo nomine, etſi nihil convenit: ſi tamen culpam in inducendis admittit, quod tales habuerit vel ſuos, vel hoſpites. Et ita Pomponius, libro ſexageſimo tertio ad Edictum probat. *l.* 11. *ff. loc. v. l.* 27. §. 9. *ff. ad leg. aquil.* Periculum præſtat, ſi qua ipſius, eorumque, quorum operâ uteretur, culpa acciderit. *l.* 25. §. 7. *eod. l.* 60. §. 7. *eod.* See the fifth Article of the fourth Section of Damages occaſioned by Faults, and the fifth Article of the eighth Section of this Title.

It does not ſeem reaſonable that the Tenant ſhould be diſcharged of the Fault of his Servants, or Under Tenants, altho' he were no way to blame for the choice of their perſons. For beſides that the Event ſhews that he has made a bad choice, he ought to anſwer for the deed of thoſe to whom he has given the uſe of the Houſe which was intruſted only to him; and the deed of thoſe perſons becomes his own, with reſpect to the perſon who has let the Houſe to him, and who treated only with him. To which caſe it may not be amiſs to apply the words of the laſt Law, ff. pro Socio. Directò cum illius perſona agi poſſe, cujus perſona in contrahenda ſocietate ſpectata ſit. *And beſides, either the Under-Tenant is able to pay the Damage occaſioned by the Fire, in which caſe the chief Tenant is at no loſs, ſince he may recover it of the Under-Tenant; or he is Inſolvent, and in this caſe the chief Tenant ought to be anſwerable for him; for he could not make the condition of the Proprietor worſe, who had thoſe an able Tenant to be anſwerable for his Houſe.*

VI.

6. Of the damage done by an Enemy of the perſon who has hired the thing.

If a Tenant, or Farmer, draw upon themſelves, by their own fault, any Damage from ſome of their Enemies; as if the ſaid Enemy, to be revenged of him for ſome bad treatment, ſets the Houſe on Fire where the Tenant lives, or cuts down the Trees of the Lands which the Farmer occupies, they ſhall be accountable for the Damages; for it is through their fault that theſe Miſchiefs do happen [f].

[f] Culpæ autem ipſius & illud adnumeratur, ſi propter inimicitias ejus vicinus arbores exciderit. *l.* 25. §. 4. *ff. loc.*

It is in the ſenſe explained in this Article, that we are to underſtand this Law. That is, that the Farmer, and Tenant, ought not to be anſwerable for the Damage done by an Enemy, unleſs they have given occaſion to it by their own fault. In relation to which we may take notice of the Example mentioned in the 66th Law, ff. ſolut. matr. *of the loſs of the Goods and Lands which* Licinnia, *Wife of* Gracchus, *brought him in Marriage; which were loſt by the Sedition of her Husband; which made it be decided, that that Loſs ſhould not fall upon the Wife, but upon the Eſtate of* Gracchus. In his rebus, quas præter numeratam pecuniam, doti vir habet, dolum malum, & culpam eum præſtare oportere, Servius ait. Ea ſententia Publii Mutii eſt. Nam is in Licinnia Gracchi uxore ſtatuit, quod res dotales in ea ſeditione, quâ Gracchus occiſus erat, periſſent, quia Gracchi culpâ ea ſeditio facta eſſet, Licinniæ præſtari oportere. *But if the Tenant, or Farmer, cannot be any ways blamed for any bad conduct in this matter, it would not be juſt to make them accountable for the conſequences of an Enmity, for which they had given no manner of occaſion; as for Inſtance, if the Enmity proceeded from one's bearing witneſs to the truth in a Court of Judicature.*

VII.

7. Of the Leſſee who quits Poſſeſſion for fear of ſome danger.

If a Country Farmer, or a Tenant of a Houſe which ſtands in a lonely place, leave the Houſe, or Farm, for fear of ſome danger, without acquainting the Owner, in caſe they were able to do it, and if their quitting the Houſe, or Farm, has been attended with ſome Damage; it is to be judged by the circumſtances of the danger, and of their conduct, whether they ought to be accountable for the Rents, and Damages or if they ought to be diſcharged o them [h].

[g] In judicio tam locati quam conducti, dolum & cuſtodiam non etiam caſum, cui reſiſti non poteſt, venire conſtat. *l.* 28. *C. de loc.*

Exercitu veniente migravit conductor: deinde hoſpitio milites feneſtras, & cætera ſuſtulerunt. Si domino non denuntiavit, & migravit, ex locato tenebitur. Labeo autem, ſi reſiſtere potuit, & non reſiſtit, teneri ait. Quæ ſententia vera eſt. Sed & ſi denuntiare non potuit, non puto eum teneri. *l.* 13. §. 7. *ff. loc.* Interrogatus, ſi quis timoris cauſa emigraſſet, deberet mercedem, nec ne? reſpondit, ſi cauſa fuiſſet cur periculum timeret, quamvis periculum verè non fuiſſet, tamen non debere mercedem: ſed ſi cauſa timoris juſta non fuiſſet, nihilominus debere. *l.* 27. §. 1. *ff. loc.*

Qui contra legem conductionis fundum ante tempus, ſine juſta ac probabili cauſa deſeruerit, ad ſolvendas totius temporis penſiones ex conducto conveniri poteſt, quatenus locatori, in id quod ejus intereſt, indemnitas ſervetur. *l.* 55. *in f. loc.* See the following Article.

VIII.

8. If the Tenant leaves his Houſe, or the Farmer his Farm.

If a Tenant ceaſes, without cauſe, to inhabit the Houſe which he has hired, or a Farmer to cultivate the Grounds which he has taken to Farm, they may be ſued before the Term, both for the Rent, and likewiſe for the damages which the Owner ſuſtains thereby [h].

[h] Si domus, vel fundus in quinquennium penſionibus locatus ſit, poteſt dominus, ſi deſeruerit habitationem vel fundi culturam colonus vel inquilinus, cum eis ſtatim agere. *l.* 24. §. 2. *ff. loc.* See the preceding Article.

IX.

9. Repairs.

If the Tenant or Farmer are obliged to any Repairs, whether by their Leaſe, or by the Cuſtoms of the Places; they will be compell'd to make them, and be liable in Damages to the Leſſor, if they have not made them [i].

[i] Sed de his quæ præſenti die præſtare debuerunt (velut opus aliquod efficerent, propagationes facerent) agere ſimiliter poteſt. *l.* 24. §. 3. *ff. loc.*

X.

10. If the Tenant abſconds.

If the Tenant of a Houſe diſappears without paying the Rent, the Owner may have recourſe to Juſtice, to get an Order for opening the Houſe, within the time that the Judge ſhall appoint; and for making an Inventory of the Moveables which ſhall be found in it, that out of them he may recover payment of his Rent, and that the Remainder may be ſecured for the Tenant, or for ſuch other perſons as ſhall be found to have an intereſt in them [l].

[l] Cùm domini horreorum, inſularumque deſiderant, diu non apparentibus, nec ejus temporis penſiones exſolventibus conductoribus, aperire, & ea quæ ibi ſunt deſcribere, à publicis perſonis, quorum intereſt, audiendi ſunt. *l.* 56. *C.*

XI.

11. *The Leaſe being out, he who hired the Thing, ought to give it back, and pay the Rent, or Hire.*

After that the time for which the Thing was let is expired, he who hired it, ought to reſtore it to the perſon who let it to him, and to pay the Rent or Hire, which was agreed upon, at the time appointed [m].

[m] Si quis conductionis titulo agrum, vel aliam quamcunque rem accepit, poſſeſſionem prius reſtituere debet. *l.* 25. *C. de locat.* Præſes Provinciæ ea quæ ex locatione debentur, exſolvi ſine mora curabit. *l.* 17. *C. eod.*

XII.

12. *The Moveables of the Leſſee that are mortgaged for the Rent.*

The Moveables which the Tenant brings into the Houſe which he has hired, are mortgaged for the payment of the Rent of the Houſe; and the Fruits of the Ground are mortgaged for the payment of the Rent of the Farm [n]. According to the Rules which ſhall be explained in the Title of Mortgages, and of the Privileges of Creditors.

[n] Eo jure utimur ut quæ in prædia urbana inducta, illata ſunt, pignori eſſe credantur, quaſi id tacitè convenerit. *l.* 4. *ff. in quib. cauſ. pign. vel hyp. t. contr. l.* 5. *C. de loc.* In prædiis ruſticis, fructus qui ibi naſcuntur, tacitè intelliguntur pignori eſſe domino fundi locati: etiamſi nominatim id non convenerit. *l.* 7. *ff. in quib. cauſ. pign. v. hyp. t. contr. l.* 3. *C. eod.*

See the twelfth, thirteenth, fourteenth and following Articles of the fifth Section of Mortgages, and of the Privileges of Creditors.

XIII.

13. *The Owner may turn out the Tenant, if he wants the Houſe himſelf.*

If the Owner of a Houſe which is let, happens to want it for his own uſe, he may oblige the Tenant to reſtore it to him, within the time that ſhall be determined by the Judge. For ſince the Owner does not let his Houſe, but only becauſe he has no occaſion for it himſelf; it is a tacit condition, that if he ſhall have occaſion for it, the Tenant ſhall be bound to deliver it up to him [o]. But the Owner may renounce this Right by the Leaſe [p].

[o] Æde quam te conductam habere dicis, ſi penſionem domino in ſolidum ſolviſti, invitum te expelli non oportet, niſi propriis uſibus dominus eam neceſſariam eſſe probaverit. *l.* 3. *C. h. t.*

[p] Omnes licentiam habent his quæ pro ſe introducta ſunt renuntiare. *l.* 29. *C. de pact. l.* 41. *ff. de min.* See the fourth Article of the fourth Section of Covenants.

XIV.

14. *If the Owner wants to repair his Houſe.*

The Tenant is likewiſe obliged to quit the Houſe, if the Owner has a mind to repair it [q]. And if the Repairs which he intends to make are neceſſary, as if it be to repair any part of the Houſe that is like to fall, the Owner will not be liable for any Damages to the Tenant; but only to diſcharge the Tenant of the Rent, or to reſtore it, if it has been already paid; for it is an accident [r]. But if the Repairs are not abſolutely neceſſary, the Owner will be bound to make good the Damages which the Tenant ſuffers by the interruption of his Leaſe. Thus, if the chief Tenant has let the Houſe to Under-Tenants for a greater Rent than what he is bound to pay by his Leaſe; the Owner is obliged to make this good to the Tenant, and to ſecure him againſt the demands of the Under-Tenants for the interruption of their Leaſes [s]. But if the Repairs may be made in a ſhort time, with little trouble to the Tenant, and without obliging him to remove, he ought to bear with this ſmall inconvenience [t].

[q] Aut corrigere domum maluerit. *d. l.* 3. *C. de loc.*

[r] Si averſione inſulam locatam dominus reficiendo, ne ea conductor frui poſſit, effecerit: animadvertatur, neceſſariò, nec ne id opus demolitus eſt. Quid enim intereſt utrum locator inſulæ propter vetuſtatem cogatur eam reficere an locator fundi cogatur ferre injuriam ejus quem prohibere non poſſit? *l.* 35. *ff. loc.* Similiter igitur & circa conductionem ſervandum puto, ut mercedem quam præſtiterim reſtituas, ejus ſcilicet temporis quo fruitus non fuerim. Nec ultrà actione ex conducto præſtare cogeris. *l.* 33. *ff. eod.*

[s] Qui inſulam triginta conduxerat, ſingula cœnacula ita conduxit, ut quadraginta ex omnibus colligerentur. Dominus inſulæ, quia ædificia vitium facere diceret, demolierat eam. Quæſitum eſt quanti lis æſtimari debeat, ſi is qui totam conduxerat, ex conducto ageret? Reſpondit, ſi vitiatum ædificium neceſſariò demolitus eſſet, pro portione, quanti dominus prædiorum locaſſet, quod ejus temporis habitatores habitare non potuiſſent, rationem duci: & tanti litem æſtimari. Sin autem non fuiſſet neceſſe demoliri, ſed quia melius ædificare vellet, id feciſſet, quanti conductoris intereſſet habitatores ne migrarent, tanti condemnari oportere. *l.* 30. *ff. loc.* Tantum ei præſtabis, quanti ejus interfuerit frui, in quo etiam lucrum ejus continebitur. *l.* 33. *ff. loc.*

[t] Ea conditione habitatorem eſſe; ut ſi quid tranſverſarium incidiſſet, quamobrem dominum aliquid demoliri oporteret, aliquam partem parvulam incommodi ſuſtineret. *l.* 27. *ff. loc.*

XV.

15. *The Tenant may be turned out for Non-payment of his Rent.*

If the Tenant does not pay his Rent, the Proprietor may turn him out by the Authority of Juſtice, within the time that ſhall be preſcribed by the Judge to the Tenant, either to pay, or to remove [u].

[u] Æde quam te conductam habere dicis, ſi penſionem domino in ſolidum ſolviſti, invitum te expelli non oportet. *l.* 3. *C. de loc.* Colonum ejectum penſionum debitarum nomine. *l.* 61. *ff. loc. v. l.* 54. §. 1. *eod.*

XVI.

16. *The Tenant may be turned out,*

The Tenant may likewiſe be turned out by Authority of Juſtice, if he makes a bad

If he make a bad uſe of the Houſe.

a bad uſe of the Houſe he has hired; as if he damages the Houſe; if he expoſes it to the hazard of being burnt, by making Fire in a place where he ought not; if he carries on any unlawful Commerce in the Houſe, or ſuffers others to do it; or if he makes a bad uſe of the Houſe any other manner of way.

[x] Aut tu malè in re locata verſata es. *d. l.* 3. *C. de loc. v. l.* 11. §. 1. *ff. eod. Nov.* 14. *c.* 1.

XVII.

17. Intereſt of the Rent, or Hire.

If the Tenant who owes his Rent, or he who gives out any Work to be done, does not pay the Rent, or Hire, at the time appointed, they will be liable for the Intereſt from the time of the Demand[y].

[y] Præſes provinciæ ea quæ ex locatione debentur exolvi ſine mora curabit, non ignarus ex locato & conducto actionem cùm ſit bonæ fidei, poſt moram uſuras legitimas admittere. *l.* 17. *C. de loc. l.* 54. *ff. eod.*

SECT. III.

Of the Engagements of the Leſſor.

The CONTENTS.

1. *The Leſſor is obliged to procure a free Enjoyment to the Leſſee.*
2. *Eviction.*
3. *The Tenant diſſeiſed by a ſuperior Force.*
4. *Sale annuls the Leaſe.*
5. *The Legatee may diſſolve the Leaſe.*
6. *If an inconveniency happens unexpectedly.*
7. *Of the Expences laid out by the Leſſee.*
8. *Of the defects of the thing hired.*
9. *A Leaſe from him who has the Uſe and Profits.*
10. *If the Leſſor expreſſes himſelf obſcurely, his words will be interpreted againſt him.*

I.

1. The Leſſor is obliged to procure a free Enjoyment to the Leſſee.

THE Leſſor is bound to procure the free Uſe and Enjoyment of the Thing to the perſon to whom he lets it out; to deliver the thing to him in a condition to ſerve the Uſe for which it is hired, and to keep it in this good condition, making the neceſſary Repairs, which the Tenant is not bound to make neither by his Leaſe, nor by the Cuſtom of the place. And if the Leſſor does not deliver the Things in good condition, or ſuch as he promiſed them, the Leſſee will recover his Damages, and get the Leaſe to be annulled, if there is ground for it: And he will be ſtill more intitled to this Relief, if the Proprietor himſelf, or the perſons for whom he is anſwerable, hinder the Tenant from enjoying the Thing.[a]

[a] Si re quam conduxit, frui ei non liceat, fortè quia poſſeſſio ei aut totius agri, aut partis non præſtatur: aut villa non reficitur, vel ſtabulum, vel ubi greges ejus ſtare oporteat: vel ſi quid in lege conductionis convenit, ſi hoc non præſtatur, ex conducto agetur. *l.* 15. §. 1. *ff. loc.* Certè quin liceat colono, vel inquilino relinquere conductionem, nulla dubitatio eſt—— ſi oſtia, feneſtraſve nimium corruptas, locator non reſtituat. *l.* 25. §. 2. *ff. loc.* Planè ſi fortè dominus frui non patiatur—— quod intereſt præſtabitur. *l.* 15. §. 8. *ff. loc.* See the ſixth Article of the ſixth Section.

II.

2. Eviction.

If the Tenant is expelled by an Eviction, the Leſſor is liable in Damages for the interruption of the Leaſe. For altho' this be a kind of caſualty, yet the Leſſor is notwithſtanding bound to procure a free and undiſturbed Poſſeſſion of the Thing to the Tenant, and to put a ſtop to all Claims made by any other perſon to the Thing that is let, in the ſame manner as the Seller is obliged to do with reſpect to the thing he ſells[b].

[b] Si quis domum bonâ fide emptam, vel fundum locaverit mihi, iſque ſit evictus, ſine dolo malo culpaque ejus; Pomponius ait, nihilominus eum teneri ex conducto ei qui conduxit: ut ei præſtetur frui, quod conduxit, licere. Planè ſi dominus non patitur, & locator paratus ſit aliam habitationem non minùs commodam præſtare, æquiſſimum eſſe ait abſolvi locatorem. *l.* 9. *ff. loc. v. l.* 7. & *l.* 8. *eod.*

We have not ſet down in the Article the exception made in this Law, of the caſe where the Leſſor, or Landlord, offers the Tenant another Lodging; becauſe ſuch an accommodation is hardly poſſible; unleſs it be by common conſent. And we muſt leave it to the diſcretion of the Judge, to conſider what regard ought to be had to ſuch Offers.

III.

3. The Tenant diſſeiſed by a ſuperior Force.

If the Tenant is turned out by the Act of the Prince, by a ſuperior Force, or by ſome other Accident; or if the Land or Tenement is deſtroyed by an Inundation, by an Earthquake, or other Event; the Leſſor who was bound to give the Land or Tenement, cannot demand any Rent for it, and will be obliged to reſtore ſo much of it as he has received, but without any other Damages: For no Man is to be accountable for Accidents[c].

[c] In judicio tam locati quàm conducti, dolum & cuſtodiam, non etiam caſum cui reſiſti non poteſt, venire conſtat, *l.* 28. *C. de loc.* Non in quod ſua intereſt conductor conſequitur, ſed mercedis exonerationem.

rationem. *l.* 15. §. 7. *ff. loc.* Si ab eo interpellabitur, quem tu prohibere propter vim majorem, aut potentiam ejus non poteris, nihil amplius ei quam mercedem remittere: aut reddere debebis. *l.* 33. *in f. eod.* Incendia, aquarum magnitudines, impetus prædonum, à nullo præstantur. *l.* 23. *ff. de reg. jur.*

IV.

4. Sale annuls the Leaſe. If the Leſſor ſells a Houſe, or any other Eſtate, which he had let out, the Leaſe is annulled by this change of the Proprietor; and the Purchaſer may uſe and diſpoſe of the thing as he pleaſes; unleſs the Seller has obliged him to continue the Leaſe. But if the Purchaſer turn the Tenant out, the Leſſor is bound for the Damages which this interruption of the Leaſe may have cauſed [d].

[d] Qui fundum fruendum, vel habitationem alicui locavit, ſi aliqua ex cauſa fundum vel ædes vendat, curare debet apud emptorem ut quoque eadem pactione & colono frui, & inquilino habitare liceat. Alioquin prohibitus is, aget cum eo ex conducto. *l.* 25. §. 1. *ff. loc.* Emptorem quidem fundi neceſſe non eſt ſtare colono, cui prior dominus locavit, niſi ea lege emit. *l.* 9. *C. eod.*

See the remark on the following Article.

V.

5. The Legatee may diſſolve the Leaſe. If the Leſſor deviſes the Houſe, or Lands which he has let out, and dies; the Legatee is not obliged to continue the Leaſe made by the Teſtator; for he is a new Proprietor, as is the Buyer. But if the Tenant is turned out by the Legatee, he will recover his Damages againſt the Heir, or Executor, who is bound to make good the deed of the deceaſed [e].

[e] Qui fundum colendum in plures annos locaverat, deceſſit, & eum fundum legavit. Caſſius negavit poſſe cogi colonum, ut eum fundum coleret, quia nihil hæredis intereſſet. Quòd ſi colonus vellet colere, & ab eo cui legatus eſſet fundus prohiberetur, cum hærede actionem colonum habere, & hoc detrimentum ad hæredem pertinere. *l.* 32. *ff. loc.*

It is neceſſary to remark on this and the foregoing Article, that the Tenant who is expelled by the Legatee, or Purchaſer, retains his Mortgage for his Leaſe on the Eſtate which is ſold, or deviſed; and that he may bring his Action for his Mortgage againſt the Poſſeſſors, to recover the Damages he ſuffers by the interruption of the Leaſe. And they will have their Warranty; viz. the Buyer from his Seller, and the Legatee from the Executor.

VI.

6. If an inconvenience happens unexpectedly. If a Houſe that is let becomes too inconvenient, altho' without the deed of the Leſſor; as if a Neighbour raiſing his Building, darkens the Lights; the Leſſor is bound to make good the Damages of the Tenant, who may, if he pleaſes, vacate the Leaſe. For altho' this be an accident, yet the Houſe being let for its uſe, in the condition it was in at the time of letting, whatever be the cauſe that makes it leſs uſeful, the damage ought to fall upon the Leſſor [f].

[f] Si vicino ædificante obſcurentur lumina cœnaculi, teneri locatorem inquilino. Certè quin liceat colono vel inquilino relinquere conductionem, nulla dubitatio eſt. De mercedibus quoque ſi cum eo agatur, reputationis ratio habenda eſt. *l.* 25. §. 2. *ff. loc.*

VII.

7. Of the Expences laid out by the Leſſee. If the Leſſee finds himſelf under a neceſſity of being at ſome charge in preſerving the Thing he has hired; as if the Tenant of a Houſe has prop'd up that which was in danger of falling, or if he has been at any other neceſſary Expence, which he was not bound to, neither by his Leaſe, nor by the Cuſtom of the place, the Leſſor is obliged to reimburſe him [g].

[g] In conducto fundo ſi conductor, ſua opera aliquid neceſſariò, vel utiler auxerit, vel ædificaverit, vel inſtituerit, cum id non conveniſſet: ad recipienda ea quæ impendit, ex conducto cum domino fundi experiri poteſt, *l.* 55. §. 1. *ff. loc.*

VIII.

8. Of the defects of the thing hired. If he who lets out a Thing for ſome uſe, gives it ſuch that by reaſon of ſome defect in it there happens ſome damage, he ſhall be anſwerable for it. Thus, for Inſtance, if he who lets out Veſſels for holding of Oil, Wine, or other Liquors, gives ſuch Veſſels as are not in a good condition, he ſhall be liable for the Loſs, or Damage that happens on that account. For he who lets a thing for any Uſe, ought to know if it is proper for it, and to warrant that uſe for which he takes the Hire. But if the defects of the Things that are let, are the bare effect of ſome caſualty, which he who lets them could neither know, nor preſume to be in them, he ſhall not be anſwerable for the event of this Accident; but only to give back the Hire or Rent. Thus, for Example, if in a Paſture-Ground which is farmed out, there happen to be Herbs which deſtroy the Farmer's Cattle, the Proprietor, who was ignorant of this defect, either becauſe theſe Herbs grew up of a ſudden, or having ſome other juſt cauſe of his Ignorance, will not be accountable for the Loſs of the ſaid Cattle, but he cannot demand any Rent for the Ground [h].

[h] Si quis dolia vitioſa ignarus locaverit: deinde vinum effluxerit, tenebitur in id quod intereſt. Nec ignorantia ejus erit excuſata: aliter atque ſi ſaltum paſcuum locaſti, in quo herba mala naſcebatur. Hic enim, ſi pecora vel demortua ſunt, vel etiam deteriora facta, quod intereſt præſtabitur, ſi ſciſti. Si ignoraſti, penſionem non petes. *l.* 19. §. 1. *ff. loc. v. l.* 45. §. 1. *eod.*

See the third Article of the third Section of the Loan of Things to be reſtored in ſpecie.

IX.

9. *A Leaſe from him who has the Uſe and Profits.*

If the Leſſor had only the Uſe and Profits of the Thing let, and the Leaſe is not limited to the time which the Uſufruct may laſt, his Heir or Executor will be liable for the Damages occaſioned by the interruption of the Leaſe, when the Uſufruct expires[1].

[1] Si fructuarius locaverit fundum in quinquennium, & deceſſerit, hæredem ejus non teneri ut frui præſtet. *l.* 9. §. 1. *ff. loc.* Quid tamen, ſi non quaſi fructuarius ei locavit, ſed ſi quaſi fundi dominus, videlicet tenebitur. Decepit enim conductorem. *d.* §. *in f.*

X.

10. *If the Leſſor expreſſes himſelf obſcurely, his words will be interpreted againſt him.*

The Leſſor is obliged to make known to the Leſſee wherein conſiſts the Thing which he lets, to declare its defects, and to explain every thing that may give occaſion to any Error or Miſtake. And if he has expreſſed himſelf in dark or ambiguous terms, his words will be interpreted againſt him[1].

[1] Veteribus placet, pactionem obſcuram, vel ambiguam venditori, & qui locavit, nocere, in quorum fuit poteſtate, legem apertius conſcribere. *l.* 39. *ff. de pact. v. l.* 21. *l.* 33. *ff. de contr. empt.*

See the thirteenth Article of the ſecond Section of Covenants, and the fourteenth Article of the eleventh Section of the Contract of Sale.

SECT. IV.

Of the nature of the Leaſes of Farms.

ALL that has been ſaid in the three firſt Sections, is common to Leaſes of Farms, and ought to be applied to them, except ſome Articles of which it is eaſy to judge, that they have no relation to them. Thus, what has been ſaid of the Landlord's right to turn the Tenant out of his Houſe, if he has occaſion for it himſelf, has no relation to a Leaſe of Lands. In the ſame manner it will be eaſy to judge of the other Rules which ought, or ought not to be applied to Leaſes of Farms. And it remains only to explain in this Section, and the two following, what is ſingular in the Nature of Leaſes of Farms, and in the Engagements of the Farmer, and thoſe of the Proprietor, that ſo we may paſs on to the other matters of this Title.

The CONTENTS.

1. *Definition of Leaſes of Farms, and of what Eſtates they are made.*
2. *What other Things may be farmed out.*
3. *The ſame.*
4. *Difference between Leaſes of Houſes, and Farms.*
5. *The effect of the uncertainty of Events.*
6. *Accidents of two kinds, Natural, and thoſe which are the Act of Man.*
7. *Renewing of the Leaſe.*
8. *Divers effects of a tacit Renewal of the Leaſe.*
9. *The tacit Renewal of the Leaſe, renews the ſame Conditions.*

I.

1. *Definition of Leaſes of Farms, and of what Eſtates they are made.*

LEaſes of Farms are Contracts, by which Lands are let out, which naturally produce Fruits, whether by Culture, as Arable-Land, Vineyards; or without Culture, as a Coppice, a Fiſh-pond, Paſture-Ground. And this diſtinguiſhes the Leaſes of theſe kinds of Poſſeſſions from the Leaſes of Houſes, and other Buildings, which produce no manner of Fruit; and which are let only for the conveniency of dwelling in them, or for ſome other uſe[a].

[a] Frugem pro reditu appellari, non ſolum quod frumentis, aut leguminibus, verùm & quod ex vino, ſylvis cæduis—— capitur. *l.* 77. *ff. de verb. ſign.* fundum fruendum, vel habitationem. *l.* 25. §. 1. *ff. loc.*

II.

2. *What other things may be farmed out.*

We may likewiſe let to Farm, the Grounds which produce other kinds of Revenues, as a Quarry to dig Stone out of, Places out of which they dig Gravel, Potters-Clay, Coal, Lime, and other Matters; and, in general, every thing which is the product of a Ground, or which may be digged out of it, may be farmed out[b].

[b] Quidquid in fundo naſcitur, quidquid inde percipi poteſt, ipſius fructus eſt. *l.* 9. *ff. de uſufr.* quod ex cretifodinis, lapidicinis capitur. *l.* 77. *ff. de verb. ſign.* Arundinem cæduam, & ſylvam in fructum eſſe. *l.* 40. §. 4. *ff. de contr. empt.*

III.

3. *The ſame.*

We may likewiſe farm out a Right of Hunting, and Fiſhing, as alſo other Revenues which do not proceed from the Things themſelves, and yet are the product of the Grounds. Thus we farm out a Right to gather a Toll, the Paſſage of a Bridge, or of a Ferry-Boat, and other Duties of the like kind[c].

[c] Aucupi-

upiorum quoque, & venationum reditum fit, libro octavo juris civilis, ad fructuarium inere, ergo & piſcationum. *l.* 9. §. 5. *ff. de uſuf.* Vectigalium. *l.* 4. *C. de vectig. & comm.*

IV.

4. *Difference between Leaſes of Houſes, and Farms.*

The Leaſe of a Farm differs from the Leaſe of a Houſe, or other Building, in that the Tenant of a Houſe knows certainly what it is he is to enjoy, and what benefit he will reap from the Houſe, whether it be to dwell in it, or to put it to ſome other uſe for which he hires it; whereas the Farmer is ignorant what the Fruits of the Ground, and the other Revenues which he takes to Farm, will juſtly amount to, becauſe of the uncertainty of their being of greater or leſſer Quantity, and Value, and of the danger of a Barrenneſs, and other Accidents, which may diminiſh, or quite deſtroy the Revenue [d].

[d] *This is a conſequence of the nature of theſe two kinds of Revenues.*

V.

5. *The effect of the uncertainty of Events.*

This uncertainty of the Events which may diminiſh the Revenues which are farmed out, or quite deſtroy them, as likewiſe of thoſe which may augment them, makes the Parties in their Contracts about Farms, to treat with the view of this Hope, and of this Danger: And it is for this reaſon that they may covenant, that the Farmer ſhall not pretend any diminution of his Rent becauſe of Barrenneſs, Hail, or other Accidents [e].

[e] Si quis fundum locaverit, ut etiam ſi quid vi majore accidiſſet, hoc ei præſtaretur, pacto ſtandum eſſe. *l.* 9. §. 2. *ff. loc. l.* 8. *C. eod.* See the following Section.

VI.

6. *Accidents of two kinds, Natural, and theſe which are the act of Man.*

The Covenant which obliges the Farmer to pay his Rent, notwithſtanding Accidents, does not extend to that which may happen by the Hand of Man, ſuch as an open Force, a War, a Fire, and other Accidents of the like kind, which no Man could foreſee [f]. But it is to be underſtood only of what falls out naturally, thro' the injury of the Weather, and which it is reaſonable to expect; ſuch as a Froſt, an Inundation, and other caſes of the like nature.

[f] De quo cogitatum non docetur. *l.* 9. *in f. ff. de tranſ.* See the twenty firſt Article of the ſecond Section of Covenants.

VII.

7. *Renewing of the Leaſe.*

If the term of the Leaſe of a Farm being expired, the Leſſor ſuffers the Farmer to remain in poſſeſſion, and the Farmer continues to manage the Farm; the Leaſe is renewed by this tacit conſent [g].

[g] Qui impleto tempore conductionis remanſit in conductione —— reconduxiſſe videbitur. *l.* 13. §. 11. *ff. loc.*

VIII.

8. *Divers effects of a tacit Renewal of the Leaſe.*

The tacit Renewal of the Leaſe continues it either only for the year which is begun anew, or even for two years, or for the ſame ſpace of time as the firſt Leaſe, or for a ſhorter time, according to the intention of the Contracters, and the circumſtances. Thus when the Leaſe is of ſuch a nature, that there is an inequality of the Produce, between one year and another, as if in a Leaſe of Arable Lands for ſeveral years, there were a greater number, or ſome of the beſt Fields to be ploughed up one year more than the other; the tacit Renewal of the Leaſe could not be for leſs than two years. Thus in Leaſes of Houſes, the Landlord and the Tenant may, when they pleaſe, interrupt the Leaſe that is thus tacitly renewed, they giving one another a certain time to provide themſelves in, according as it is regulated by Cuſtom, or by the Judge. But if it is a Place, the uſe of which demands in its own nature a longer prorogation of time, then the renewing of the Leaſe will take place for the time of that uſe. Thus, the tacit renewing of the Leaſe of a Barn reaches to the time of Harveſt, and that of a Wine-preſs, to the ſeaſon of the Vintage [h].

[h] Quod autem diximus taciturnitate utriuſque partis colonum reconduxiſſe videri, ita accipiendum eſt, ut in ipſo anno, quo tacuerunt, videantur eandem locationem renovaſſe; non etiam in ſequentibus annis: etſi luſtrum forte ab initio fuerat conductioni præſtitutum. Sed & ſi ſecundo quoque anno, poſt finitum luſtrum, nihil fuerit contrarium actum, eamdem videri locationem illo anno permanſiſſe. Hoc enim ipſo, quo tacuerunt, conſenſiſſe videntur. Et hoc deinceps in uno quoque anno obſervandum eſt. *l.* 13. §. 11. *ff. loc.* Qui ad certum tempus conducit, finito quoque tempore, colonus eſt. Intelligitur enim dominus, cùm patitur colonum in fundo eſſe, ex integro locare: & hujuſmodi contractus neque verba, neque ſcripturam utique deſiderant, ſed nudo conſenſu convaleſcunt. *l.* 14. *ff. loc.* Tacito conſenſu eandem locationem ——renovare videtur. *l.* 16. *C. eod.* In urbanis autem prædiis alio jure utimur, ut prout quiſque habitaverit, ita & obligetur. *d. l.* 13. §. *ult.*

IX.

9. *The tacit Renewal of the Leaſe, renews the ſame Conditions.*

The tacit Renewal of the Leaſe, renews likewiſe all its Conditions. For it is only a continuance of the firſt Leaſe, with all its conſequences. But if in the firſt Leaſe there were Sureties, their

their Engagement ends with the Leaſe, and is not renewed by the tacit Renewal of the Leaſe, unleſs they have reiterated their conſent; becauſe their Obligation was limited to the time of the Leaſe in which they engaged themſelves [f].

[f] Pignora videntur durare obligata, ſed hoc ita verum eſt, ſi non alius pro eo in priore conductione res obligaverat, hujus enim novus conſenſus erit neceſſarius. *l.* 13. §. 11. *ff. loc.* Tacito conſenſu eandem locationem una cum vinculo pignoris renovare videtur. *l.* 19. *C. eod.*

We have not ſet down in this Article, that the Renewal of the Leaſe renews the Mortgage. For that which is ſaid in the Laws quoted on this Article, that the Pledge remains, or is renewed by the Renewal of the Leaſe, ought to be underſtood only according to our Cuſtom, of what is tacitly mortgaged to the Proprietor for the Rent of his Farm, and without Covenant, as the Fruits of the Ground. But the Mortgage which the Proprietor had expreſly by his Leaſe on the Goods of the Farmer, is extinguiſhed with the Leaſe, and the Renewal of the Leaſe does not renew this Mortgage, unleſs it were done in the preſence of Publick Notaries. And then this ſecond Mortgage would have its effect only from the time of its date. And it is the ſame thing with reſpect to the Mortgage which the Farmer has on the Eſtate of the Proprietor. See the third Article of the firſt Section, and the third Article of the ſeventh Section of Mortgages.

SECT. V.

Of the Engagements which the Farmer is under to the Proprietor.

The CONTENTS.

1. *The Farmer ought to uſe the Lands, as any careful Man would do, if they were his own.*
2. *The Fruits are mortgaged for the Rent.*
3. *The Farmer who ſhares the Fruits with the Owner, bears the loſs of all Accidents.*
4. *The effect of Accidents in a Leaſe which is only for one year.*
5. *A ſmall Loſs occaſioned by the nature of the Land, or Fruits, or ſome other cauſe.*
6. *A conſiderable Loſs by the ſame cauſes, or other accidents.*
7. *Compenſation of good and bad years.*
8. *The loſs of the Seed and Tillage falls on the Farmer.*
9. *The Farmer cannot quit his Farm.*

I.

1. *The Farmer ought to uſe the Lands, as any careful Man would do, if they were his own.*

THE Farmer ought to uſe the Lands he has in Farm, as any prudent, diſcreet Man would do, if they were his own, and to keep them, preſerve and cultivate them, in the manner as is agreed on by the Leaſe, or regulated by Cuſtom. And he cannot, to increaſe his Profits out of the Lands, make any Innovation which may be of prejudice to the Proprietor. Thus, if in a Farm there are Arable Lands, he cannot ſow them when they ought to lie fallow, nor ſow Wheat, when he ought only to ſow Barley or Oats, if theſe changes would make the Lands to be in a worſe condition at the end of the Leaſe, than they ought to be when they are reſtored to the Proprietor. And the Farmer ought likewiſe to cultivate the Grounds in their proper ſeaſons, and according to Cuſtom [a].

[a] Conductor omnia ſecundùm legem conductionis facere debet, & ante omnia colonus curare debet, ut opera ruſtica ſuo quoque tempore faciat, ne intempeſtiva cultura deteriorem fundum faceret. *l.* 25. §. 3. *ff. loc.*

[*In* England, *Tenants of Lands for term of Life, or for Years, if they commit any Waſte, are liable to an Action of Waſte; by which they loſe the Thing which they have waſted, and muſt pay treble Damages.* Vid. Stat. 6. Ed. 1. cap. 5.]

II.

2. *The Fruits are mortgaged for the Rent.*

The Fruits and Profits of the Ground that is farmed out, are mortgaged for the Rent of the Farm, whether the Farmer continues in the poſſeſſion of the Farm himſelf, or ſubſtitutes another in his place, or lets it out to Under-Tenants [b].

[b] Si colonus locaverit fundum——fructus in cauſa pignoris manent, quemadmodum eſſent, ſi primus colonus eos percepiſſet. *l.* 24. §. 1. *ff. loc. l.* 53. *eod.* See the twelfth Article of the fifth Section of Mortgages.

III.

3. *The Farmer who ſhares the Fruits with the Owner, bears the loſs of all Accidents.*

He who holds a Farm on condition to give to the Proprietor a certain Portion of the Fruits, and to keep the Remainder for himſelf for his manuring and ſowing the Grounds, can claim nothing from the Proprietor either for the Tillage, or the Seed, whatever loſs may happen by an accident, even altho' he ſhould have no Crop at all. For their Leaſe makes between them a kind of Partnerſhip, in which the Proprietor gives the Land, and the Farmer or Tenant the Seed, and the Tillage; each of them hazarding the Portion of the Fruits which this Partnerſhip entitles them to [c].

[c] Vis major quam Græci Θεῖ βίαν, id eſt, vim divinam appellant, non debet conductori damnoſa eſſe——apparet autem de eo nos colono dicere qui ad pecuniam numeratam conduxit. Alioquin partiarius colonus, quaſi ſocietatis jure, & damnum, & lucrum cum domino fundi partitur. *l.* 25. §. 6. *ff. loc.* As to the Farmer who pays a certain Rent, ſee the following Article.

IV. If

IV.

4. The effect of Accidents in a Leaſe which is only for one year.

If a Farmer who has a Leaſe only for one year, and is obliged to pay his Rent in Money, reaps nothing becauſe of ſome Accident, ſuch as a Froſt, a Storm of Hail, an Inundation, and other caſes of the like nature; or even becauſe of ſome Act of Man, as if in a time of War the whole Crop is deſtroyed, or taken away by Force; he ſhall be diſcharged from paying his Rent, or ſhall recover it if he has already paid it[d]. For it is but reaſonable, that in the caſe of a Leaſe, where the Leſſor ſecures to himſelf a Rent, the Leſſee ſhould be ſecure of enjoying ſomething: and beſides, the Leaſe is of the Fruits which the Farmer ſhall reap, and which it is preſuppoſed that he will reap. But if it was agreed, that the Accidents ſhould fall upon the Farmer; he will then be obliged to pay his Rent, notwithſtanding theſe Loſſes.

[d] Servius omnem vim, cui reſiſti non poteſt, dominum colono præſtare debere, ait: ut puta fluminum, graculorum, ſturnorum, & ſi quid ſimile acciderit: aut ſi incurſus hoſtium fiat. *l.* 15. §. 2. *ff. loc.* Si labes facta ſit, omnemque fructum tulerit, damnum coloni non eſſe: ne ſupra damnum ſeminis amiſſi, mercedes agri præſtare cogatur. Sed & ſi uredo fructum oleæ, corruperit, aut ſolis fervore non aſſueto id acciderit, damnum domini futurum. *d.* §. 2. See the Text cited on the preceding Article. And the fifth and ſixth Articles of the fourth Section, and the ſeventh Article of this Section.

V.

5. A ſmall Loſs occaſioned by the nature of the Lands, or Fruits, or ſome other cauſe.

If without an extraordinary Accident, and only thro' the Nature of the Land it ſelf, and of the Fruits, or becauſe of ſome ordinary Event, there happens ſome loſs that is not very conſiderable; as if the Fruits are not of a good quality, or not in quantity enough; if Tares growing up with the Corn diminiſh the Crop; if Paſſengers have done any ſlight damage to the Fruits; in theſe caſes, and others of the like nature, the Farmer cannot pretend any diminution of his Rent for theſe kinds of ſmall Loſſes, altho' his Leaſe were only for one Year: For ſince he was to have the whole Profit, how great ſoever it ſhould be; it is but juſt that he ſhould bear theſe inconſiderable Loſſes[e].

[e] Si quæ vitia ex ipſa re oriantur, hæc damno coloni eſſe. Veluti ſi vinum coacuerit, ſi raucis aut herbis ſegetes corruptæ ſint. *l.* 15. §. 2. *ff. loc.* Cùm quidam de fructuum exiguitate quæreretur, non eſſe rationem ejus habendam, reſcripto divi Antonini continetur. Item alio reſcripto ita continetur: novam rem deſideras, ut propter vetuſtatem vinearum, remiſſio tibi detur. *d. l.* 15. §. 5. Si nihil extra conſuetudinem acciderit, damnum coloni eſſe. *d. l.* 15. §. 2. *v. l.* 78. *in f. ff. de contr. empt.* Idemque dicendum ſi exercitus prætereiens, per laſciviam aliquid abſtulit. *d.* §. 2. modicum damnum—— ferre debet colonus, cui immodicum lucrum non auferetur. *l.* 25. §. 6. *ff. loc.* See the following Articles.

VI.

6. A conſiderable Loſs by the ſame cauſes, or other accidents.

If the damage which has happened to the Farmer who has a Leaſe only for one year, proves to be conſiderable; whether it has been occaſioned by the Events mentioned in the foregoing Article, or by a Storm of Hail, a Froſt, or other Accident; altho' the loſs be not of all the Fruits of the Farm, yet the Farmer ought to have an abatement of ſome part of his Rent, ſuch as the Judge in his Prudence ſhall think fit to decree[f].

[f] Vis major—— non debet conductori damnoſa eſſe, ſi plus quam tolerabile eſt, læſi fuerint fructus. *l.* 25. §. 6. *ff. loc.*

Omnem vim cui reſiſti non poteſt, dominum colono præſtare debere. *l.* 15. §. 2. *ff. loc.* See the following Article.

VII.

7. Compenſation of good and bad years.

If the Leaſe being for two or more years, there happens in ſome of them Accidents which occaſion Loſſes, whether it be of the whole Fruits, or a great part of them; and that theſe Loſſes are not compenſated by the Profits of the other years, the Farmer may demand an abatement of his Rent, according as the quality of the Loſs, and the other circumſtances may render his Demand juſt. But if there was any Covenant in the Leaſe, or any Cuſtom of the Place, which did regulate the caſe of Loſſes of this kind, it would be neceſſary to keep to that[g].

[g] Licet certis annuis quantitatibus fundum conduxeris, ſi tamen expreſſum non eſt in locatione (ut mos regionis poſtulabat) ut ſi qua lue tempeſtatis, vel alio cæli vitio damna accidiſſent, ad onus tuum pertinerent: & quæ evenerunt ſterilitates, ubertate aliorum annorum repenſatæ non probabuntur, rationem tui juxta bonam fidem haberi, rectè poſtulabis. Eamque formam qui ex appellatione cognoſcet, ſequetur. *l.* 8. *C. de loc. v. l.* 18. *eod.*

Si uno anno remiſſionem quis colono dederit ob ſterilitatem, deinde ſequentibus annis contigit ubertas, nihil obeſſe domino remiſſionem, ſed integram penſionem etiam ejus anni quo remiſit, exigendam. *l.* 15. §. 4. *ff. loc.* Circa locationes atque conductiones, maximè fides contractus ſervanda eſt, ſi nihil ſpecialiter exprimetur contra conſuetudinem regionis. *l.* 19. *C. eod.* See the preceding Articles.

If the loſs happened the firſt year of the Leaſe, and that it proved to be of the whole Crop, would it be neceſſary that, in expectation of the end of the Leaſe, to judge whether there would be ground for an abatement or not, the Farmer ſhould be compelled to pay the firſt year's Rent, the conſequences of which might perhaps diminiſh the Crops of the following years; as if a Shower of Hail had not only deſtroyed the Fruits of a Vineyard, or other Plantation, but likewiſe damaged or broken the Vines or Trees? And would it not be juſt, to defer the regulating of the Abatement till the end of the Leaſe, if there ſhould then appear to be ground for it, and to leave it

to the prudence of the Judge to grant in the mean while ſome delay for the payment of the firſt year's Rent, or a part of it, according to the circumſtances of the quality of the Loſs, and the condition of the Proprietor, if he is able to tarry, as alſo the condition of the Farmer, if he is not able to pay?

VIII.

8. *The Loſs of the Seed and Tillage falls on the Farmer.*

In all the Accidents which cauſe any loſs to the Farmer, for which he may claim an Abatement, either of the whole Rent, or a part of it, he cannot demand any Damages, neither for the Profits which he might have reaped, nor even for the Seed, or Tillage [h]. For he was obliged to be at theſe charges, that he might have a right to the Fruits.

[h] Ubicumque tamen remiſſionis ratio habetur ex cauſis ſuprà relatis, non id quod ſua intereſt conductor conſequitur, ſed mercedis exonerationem, pro rata. Suprà denique, damnum ſeminis ad colonum pertinere declaratur. *l.* 15. §. 7. *ff. loc. d. l.* §. 2. See the third Article of this Section.

IX.

9. *The Farmer cannot quit his Farm.*

The Farmer cannot quit his Farm, nor ceaſe to manure it; and if he fails either to till the Ground, or to perform any other Engagement, as if he was obliged to any Repairs; the Proprietor may bring his Action againſt him, both to compel him to perform his Engagements, and to make good the Damages which he has ſuffered by the interruption of the Leaſe [i].

[i] Si domus vel fundus in quinquennium penſionibus locatus ſit, poteſt dominus, ſi deſeruerit habitationem vel fundi culturam colonus vel inquilinus, cum eo ſtatim agere. Sed & de his quæ præſenti die præſtare debuerunt, velut opus aliquod efficerent, propagationes facerent, agere ſimiliter poteſt. *l.* 24. §. 2. & 3. *ff. loc.*

SECT. VI.

Of the Engagements which the Proprietor is under to the Farmer.

The CONTENTS.

1. *What the Proprietor is bound to furniſh to the Farmer.*
2. *Moveables and Tools given to the Farmer.*
3. *Repairs made by the Farmer.*
4. *The Expences which the Farmer has been at, the Leaſe being interrupted.*
5. *Improvements made by the Farmer.*
6. *If the Farmer is moleſted by the Proprietor.*
7. *Of the Trouble which the Proprietor could not prevent.*

I.

the Proprietor is bound to furniſh to the Farmer.

BEſides the Engagements which the Proprietor is under who lets any thing to Hire, which are explained in the third Section, he who lets out a Country Farm, ought to furniſh that which the Leaſe obliges him to, for manuring the Grounds, and gathering in the Fruits, ſuch as Barns, Tubs and Preſſes for making Wine, and other things, according as it is agreed between the Parties, or regulated by Cuſtom [a].

[a] Illud nobis videndum eſt, ſi quis fundum locaverit, quæ ſoleat, inſtrumenti nomine, conductori præſtare: quæque ſi non præſtet, ex locato tenetur, &c. *l.* 19. §. 2. *ff. loc.* Si quid in lege conductionis convenit, ſi hoc non præſtatur; ex conducto agetur. *l.* 15. §. 1. *eod.* Utiliter ex conducto agit is, cui ſecundùm conventionem non præſtantur, quæ convenerant. *l.* 24. §. 4. *verſic. item eod.*

II.

2. *Moveables and Tools given to the Farmer.*

If the Proprietor furniſhes the Farmer with any Moveables and Inſtruments for cultivating the Farm, the Farmer is obliged to take care of them purſuant to the Rules explained in the third and following Articles of the ſecond Section. But if theſe things are eſtimated in the Leaſe at a certain Price, it will be a Sale, and they will be the Farmer's own [b].

[b] Cùm fundus locetur, & æſtimatum inſtrumentum colonus accipiat, Proculus ait, id agi, ut inſtrumentum emptum habeat colonus: ſicuti fieret, cum quid æſtimatum in dotem daretur. *l.* 3. *ff. loc.*

III.

3. *Repairs made by the Farmer.*

If the Farmer has made any Repairs, or been at other neceſſary charges, which he was not bound to by his Leaſe, nor by the Cuſtom of the place; the Proprietor will be obliged to reimburſe him of what he has laid out, or to diſcount it on the Rent [c].

[c] In conducto fundo, ſi conductor ſua opera aliquid neceſſario, vel utiliter auxerit, vel ædificaverit, vel inſtituerit, cùm id non conveniſſet: ad recipienda ea quæ impendit, ex conducto cùm domino fundi, experiri poteſt. *l.* 55. §. 1. *ff. loc.*

IV.

4. *The Expences which the Farmer has been at, the Leaſe being interrupted.*

If a Farmer whoſe Leaſe might be interrupted by ſome Event which he ought to have foreſeen, has nevertheleſs been at ſome charges, in hopes that he ſhould enjoy the Farm for a certain time, as if he has laid up any great ſtore of Proviſions, bought Cattel, or been at other Expences of this kind; he cannot pretend to recover any of them, if his Leaſe is interrupted by the Event which he had reaſon to expect.

As

As if it was a Leaſe granted by one who had only the Uſe and Profits of the Eſtate, which came to ceaſe by the death of the Uſufructuary, who had let out only what Right he himſelf had: or a Leaſe that was to be diſſolved by the event of ſome Condition. For the Farmer knowing that theſe Expences might become altogether uſeleſs, he was willing to run the hazard of the Loſſes which he might ſuffer thereby [d].

[d] Si fructuarius locaverit fundum in quinquennium, & deceſſerit —— idem (Marcellus) quærit: ſi ſumptus (conductor) fecit in fundum, quaſi quinquennio fruiturus, an recipiat: & ait, non recepturum: quia hoc evenire poſſe, proſpicere debuit. *l.* 9. §. 1. *ff. loc.*

V.

5. Improvements made by the Farmer.

If a Farmer has made Improvements which he was not bound to make, as if he has planted a Vineyard, or an Orchard, or made other Improvements of this kind, which have increaſed the Revenue of the Farm; he will recover the Expence he has been at on this account, purſuant to the Rule explained in the ſeventeenth Article of the tenth Section of the Contract of Sale [e].

[e] In conducto fundo, ſi conductor ſua opera aliquid neceſſario, vel utiliter auxerit, vel ædificaverit, vel inſtituerit, cùm id non conveniſſet: ad recipienda ea quæ impedit; ex conducto cum domino fundi experiri poteſt. *l.* 55. §. 1. *ff. loc.* Colonus, cum lege locationis non eſſet comprehenſum ut vineas poneret, nihilominus in fundum vineas inſtituit, & propter earum fructum, denis amplius aureis annuis ager locari cœperat. Quæſitum eſt ſi dominus iſtum colonum fundi ejectum, penſionum debitarum nomine, conveniat, an ſumptus utiliter factos in vineis inſtituendis reputare poſſit, oppoſita doli mali exceptione? Reſpondit, vel expenſas conſecuturum, vel nihil amplius præſtaturum. *l.* 61. *ff. loc.* Impenſas quas ad meliorandam rem vos erogaſſe conſtiterit, habita fructuum ratione reſtitui vobis jubebit. *l.* 16. *C. de evict.*

VI.

6. If the Farmer is moleſted by the Proprietor.

If the Farmer is moleſted either by the Proprietor himſelf, or by perſons whom the Proprietor might hinder from giving him any diſturbance, he ſhall be liable to make good the Damages which the Farmer ſuſtains, and all the Profit which he might have made of his Farm during the time which his Leaſe had yet to run; unleſs the trouble that was given him was only of a few days, and that matters being ſtill entire, he were re-eſtabliſhed in the peaceable Poſſeſſion of his Farm [f].

[f] Colonus, ſi ei frui non liceat, totius quinquennii nomine ſtatim rectè aget. *l.* 24. §. 4. *ff. loc.* Et quantùm per ſingulos annos compendii facturus erat, conſequetur. *d. l.* Quod ſi paucis diebus prohibuit, deinde pœnitentiam agit, omniaque colono in integro ſunt, nihil ex obligatione paucorum dierum mora minuet. *d. l.* 24. §. 4.

Si colonus tuus fundo frui à te, aut ab eo prohibetur, quem tu prohibere, ne id faciat poſſis: tantum ei præſtabis, quanti ejus interfuit frui; in quo etiam lucrum ejus continebitur. *l.* 33. *in f. ff. loc.*

VII.

7. Of the Trouble which the Proprietor could not prevent.

If the diſturbance given to the Farmer is an open Violence, or a fact which the Proprietor is not able to hinder, and for which he is not accountable; he ſhall be obliged only to abate of the Rent in proportion to the Farmer's loſs by this diſturbance; or to give back ſo much of it as he had already received. But he will not be bound to make up the profit which the Farmer might have made, if he had enjoyed his Farm peaceably [g].

[g] Sin verò ab eo interpellabitur, quem tu prohibere, propter vim majorem, aut potentiam ejus non poteris: nihil amplius ei quàm mercedem remittere, aut reddere debebis. *l.* 33. *in f. ff. loc.*

SECT. VII.

Of the Nature of Undertakings of Work by the great, and of other ways of Letting out Man's Labour, and Induſtry.

The CONTENTS.

1. *Definition.*
2. *Difference of Undertakers, according as they furniſh any of the Materials, or not.*
3. *Of him who furniſhes the Materials, and undertakes the Work.*
4. *Of the Architect who furniſhes every thing.*
5. *Conditions of Undertakings.*
6. *What things are to be regulated by the judgment of ſkilful men.*

I.

1. Definition.

IN Undertakings of Work by the great, and the other ways of Letting out the Labour of Workmen, the Leſſor is he who gives out the Work, or Buſineſs to be done; and the Leſſee, or Undertaker, is he who undertakes the Buſineſs, or Work [a].

[a] Qui ædem faciendam locaverat. *l.* 30. §. 3. *ff. loc.* See the ſecond Article of the firſt Section.

II.

2. Difference of Undertakers, according as they furniſh any of

The Undertaker is ſometimes only charged with the bare Work, as an Engraver to whom a Seal is given to be engraven; or with a bare Labour, as a Carrier; or ſometimes he is bound to furniſh

furniſh the Materials for the Work, together with his own Labour, as an Architect who furniſhes the Materials for the Building, together with his Direction and Overſight of the Work [b]. *the Materials, or not.*

[b] Si gemma includenda vel inſculpenda data ſit. *l.* 13. §. 5. *ff. loc.* Si navicularius onus Minturnas vehendum conduxerit. *d. l.* 13. §. 1. Qui ædem faciendam locaverat, in lege dixerat, quoad in opus lapidis opus erit, pro lapide, & manu pretio dominus redemptori in pedes ſingulos ſeptem dabit. *l.* 30. §. 3. *eod.*

III.

If the Workman furniſhes all the Materials, and his Work ſuch as has been agreed on, for a certain Price; as if a Goldſmith undertakes to make a Piece of Silver Plate, of ſuch a Faſhion, and for ſuch a Price, and furniſhes the Silver; it will be a Sale, and not a Letting to Hire. But if the Silver is given to the Goldſmith, and he is only to furniſh the Workmanſhip, it will be a Letting to Hire, or an Undertaking by the great [c]. *3. Of him who furniſhes the Materials, and undertakes the Work.*

[c] Si cum aurifice convenerit, ut is ex auro ſuo annulos mihi faceret, certi ponderis certæque formæ, & acceperit, verbi gratia, trecenta: utrum emptio & venditio ſit, an locatio & conductio, ſed placet, unum eſſe negotium, & magis emptionem & venditionem eſſe. Quod ſi ego aurum dedero, mercede pro opera conſtituta, dubium non eſt quin locatio & conductio ſit. *l.* 2. §. 1. *ff. loc.* §. 4. *inſt. eod.*

It is to be remarked touching the caſe ſpoken of in this Article, and others of the like nature, that all Bargains of this kind, implying the condition that the Work ſhall be well done, it may be ſaid, that at the time of the Contract, it is as it were a Letting to Hire, and an Undertaking by the great; and that in the Execution of the Contract it is as it were a Sale. And this is it that has given occaſion to the doubt mentioned in the texts quoted on this Article, whether it were a Sale, or a Letting to Hire. See the following Article.

IV.

If an Architect who undertakes a Building, engages to furniſh the Materials, it will be a Letting to Hire, and not a Sale, altho' it ſeems as if he ſold the Materials. For beſides that his principal Obligation is, to give his Direction and Overſight for the Building [d]; he does not ſell the Ground, to which the Building is only an Acceſſory. *4. Of the Architect who furniſhes every thing.*

[d] Cum inſulam ædificandam loco, ut ſua impenſa conductor omnia faciat: proprietatem quidem eorum ad me transfert, & tamen locatio eſt. Locat enim artifex operam ſuam, id eſt, faciendi neceſſitatem. *l.* 22. §. 2. *ff. loc.*

See the ſecond Article of the firſt Section, and the ninth Article of the following Section.

V.

In undertakings of Work by the great, and other Covenants which reſpect the Labour of Perſons, the Parties may regulate what ſhall be furniſhed by him who gives out the Work to be done, the quality of the Work, the time within which it ſhall be finiſhed, and other conditions of this kind; and whatever ſhall be regulated by the Contract, ought to be performed [e]. *5. Conditions of Undertakings.*

[e] Si quis in lege conductionis convenit, ſi hoc non præſtatur, ex conducto agetur. *l.* 15. §. 1. *ff. loc.* See the ſeventh Article of the ſecond Section of Covenants.

VI.

If all that is to be done, or furniſhed by the Undertaker, is not plainly enough regulated by the Contract, as if the quality of the Materials which he is to furniſh, or the quality of the Work is not expreſs'd, or the time not fixed; all theſe things, and others of the like kind, ſhall be regulated either according to Cuſtom, if there is any concerning this matter, or by the judgment of ſkilful perſons [f]. *6. What things are to be regulated by the judgment of ſkilful men.*

[f] *See the ſixteenth Article of the ſecond Section of Covenants, and the ſixth Article of the following Section.*

SECT. VIII.

Of the Engagements of the perſon who undertakes any Work, or Labour.

The CONTENTS.

1. *Undertakers anſwerable for their Ignorance.*
2. *Defects of the Materials which the Workman is to furniſh.*
3. *What care Workmen and Undertakers are bound to take.*
4. *Of the Defect of the Thing.*
5. *The care of Carriers and Watermen.*
6. *Work to be done to the Owner's Content, or the arbitration of another perſon.*
7. *Work made according to the Maſter's direction.*
8. *If the Work periſhes before it is approved of.*
9. *If the Edifice periſhes while it is a building.*
10. *If the Workman is to furniſh every thing, and the whole periſhes.*
11. *Acceſſories to the Engagement of the Undertaker.*

I.

Beſides the Engagements which are common to all perſons who hire a Thing, and which have been explained in *1. Undertakers anſwerable for*

their Ignorance.

in the ſecond and fifth Sections, thoſe who undertake any Buſineſs, or Work, ought moreover to be anſwerable for all the defects occaſioned by their Ignorance; for they ought to know how to do that which they undertake, and it is their fault if they are ignorant of what they profeſs [a].

[a] Imperitia culpæ adnumeratur. *l.* 132. *ff. de reg. jur.*

Celſus etiam imperitiam culpæ adnumerandam, libro octavo Digeſtorum, ſcripſit. Si quis vitulos paſcendos, vel farciendum quid poliendumve conduxit, culpam eum præſtare debere. Et quod imperitia peccavit, culpam eſſe; quippe ut artifex, inquit, conduxit. *l.* 9. §. 5. *ff. loc. l.* 13. *eod. l.* 25. §. 7. *eod.* Poterit ex locato cum eo agi, qui vitioſum opus fecerit. *l.* 51. §. 1. *ff. loc.* See the ſixth Article of this Section.

II.

2. Defects of the Materials which the Workman is to furniſh.

If the Undertaker is obliged to furniſh any Materials for the Work, as an Architect who has undertaken to furniſh the Materials for a Building, he ought to give them good and well conditioned; and likewiſe to anſwer for the defects which he is ignorant of; for he is bound to give that good in its kind which he ought to give; as he who lets a thing to Hire, is obliged to give it ſuch as it ought to be for the Uſe for which it is deſigned [b].

[b] Si quis dolia vitioſa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod intereſt, nec ignorantia ejus erit excuſata. *l.* 19. §. 1. *ff. loc.* Quod imperitia peccavit, culpam eſſe. Quippe ut artifex conduxit. *l.* 9. §. 5. *ff. locati.*

See the ſeventh Article of the eleventh Section of the Contract of Sale.

III.

3. What care Workmen and Undertakers are bound to take.

The Workman, or Artificer, who takes a thing into his cuſtody to work on it, and he who undertakes barely to keep a thing for a certain price, as he who undertakes to keep Cattel, ought to preſerve that which is intruſted to them, with all the care that is poſſible to be taken by perſons that are the moſt watchful and diligent. And if, for want of ſuch a care, the thing periſhes, altho' even by an accident, they will be made accountable for it; as if the Thing is ſtole, or burnt, or damaged, for want of having been laid up in a ſecure place, or for not being carefully lookt after. And it would be the ſame thing if a Workman, having in his cuſtody things belonging to ſeveral perſons, had given to one that which belonged to another, altho' by miſtake [c].

[c] Si fullo veſtimenta polienda acceperit: eaque mures roſerint, ex locato tenebitur quia debuit ab hac re cavere. Et ſi pallium fullo permutaverit, & alii alterius dederit, ex locato actione tenebitur. Etiamſi ignarus fecerit. *l.* 13. §. 6. *ff. loc.*

Poterat ea res in locum turiorem transferre. *l.* 34. *in f. ff. de dam. inf.* Qui mercedem accipit pro cuſtodia alicujus rei, is hujus periculum cuſtodiæ præſtat. *l.* 40. *ff. loc.* Quæcumque de furto diximus, eadem & de damno debent intelligi. Non enim dubitari oportet, quin is qui ſalvum fore recipit, non ſolùm à furto, ſed etiam à damno recedere videatur. *l.* 5. §. 1. *ff. naut. caup. l.* 60. §. 2. *ff. loc.* See the ſecond Article of the ſecond Section of the Loan of Things to be reſtored in Specie; the fourth Article of the third Section of a Depoſitum; and the fifth Article of the firſt Section of Perſons who drive any Publick Trade.

IV.

4. Of the defect of the Thing.

If that which is given to a Workman to be wrought, periſhes in his hands, without his Fault, and merely thro' a defect in the Thing it ſelf; as if an Amethiſt which is given to be engraven, happens to break in the hands of the Engraver, thro' ſome defect of the matter, and not thro' his unſkilfulneſs, he ſhall not be accountable for it, unleſs he has undertaken the Work at his own peril [d].

[d] Si gemma includenda, aut inſculpenda data ſit, eaque fracta ſit: ſi quidem vitio materiæ factum ſit, non erit ex locato actio: ſi imperitia facientis, erit. Huic ſententiæ addendum eſt, niſi periculum quoque in ſe artifex receperat. Tunc enim, etſi vitio materiæ id evenit, erit ex locato actio. *l.* 13. §. 5. *ff. loc.*

V.

5. The care of Carriers and Watermen.

Carriers and Watermen, and all thoſe who undertake to carry Merchant Goods, or other things, are anſwerable for the cuſtody, carriage, and tranſportation of the things which they take under their charge, and to uſe all the application, and take all the care of them that is poſſible. And if any thing periſhes, or is damaged thro' their fault, or the fault of the perſons whom they imploy, they ought to anſwer for it [e].

[e] Si magiſter navis, ſine gubernatore in fluvem navem immiſerit, & tempeſtate orta temperare non potuerit, & navem perdiderit: vectores habebunt adverſus eum ex locato actionem. *l.* 13. §. 2. *ff. loc.* Qui columnam tranſportandam conduxit, ſi ea dum tollitur, aut portatur, aut reponitur, fracta ſit, ita id periculum præſtat, ſi qua ipſius eorumque quorum opera uteretur, culpa acciderit. Culpa autem abeſt, ſi omnia facta ſunt, quæ diligentiſſimus quiſque obſervaturus fuiſſet. *l.* 25. §. 7. *ff. eod.* See the fourth Article of the ſecond Section of thoſe who drive any Publick Trade.

VI.

6. Work to be done to the Owner's content, or the arbitration of another perſon.

If it is agreed that a Work ſhall be done to the Owner's ſatisfaction, or according to the arbitration of a perſon who is named, the Workman ſhall be bound only to deliver the Work good, ſuch as will be approved of by ſkilful Men [f]. For theſe kinds of Covenants

imply the Condition, that what ſhall be regulated ſhall be reaſonable [g].

[f] Si in lege locationis comprehenſum ſit, ut arbitratu domini opus approbetur, perinde habetur ac ſi viri boni arbitrium comprehenſum fuiſſet. Idemque ſervatur, ſi alterius cujuſlibet arbitrium comprehenſum ſit. Nam fides bona exigit, ut arbitrium tale præſtetur, quale viro bono convenit. *l.* 24. *ff. loc.*

[g] *See the eleventh Article of the third Section of Covenants.*

The Emperors Gratian, Valentinian, *and* Theodoſius *ordained, that the Undertakers of Publick Works, and their Heirs, ſhould be anſwerable for the ſpace of fifteen years, for the defects of the Work.* l. 8. C. de oper. publ.

VII.

7. *Work made according to the Maſter's direction.*

Altho' the Workman ought to anſwer for the defects of the Work; yet if the Owner himſelf has ordered and directed the Work, he cannot complain of it [h].

[h] Poterit itaque ex locato cum eo agi, qui vitioſum opus fecerit. Niſi ſi ideo in operas ſingulas merces conſtituta erit. *Ut arbitrio domini opus efficeretur.* Tunc enim nihil conductor præſtare domino de bonitate operis videtur. *l.* 51. *in f. ff. loc.*

VIII.

8. *If the Work periſhes before it is approved of.*

If one has given Materials to a Workman, to make a Work at a certain rate for the whole; the Undertaker will not have performed his Engagement, nor be diſcharged from it, until the whole Work has been examined, and it appears to be ſuch as it ought to be. And if it is a Work which conſiſts of ſeveral Pieces, or is to be meaſured, and a certain Price to be paid for each Piece, or each Meaſure; the Undertaker ſhall be diſcharged in proportion to what ſhall be counted or meaſured and approved of. And on the contrary, the Undertaker ſhall bear the loſs of his Work, and make good the Damages of the Maſter, if he ſuffers any, for ſo much of the Work as is found not to be of the quality which it ought to have. But if in the caſe of either of theſe two Bargains, the Thing periſhes by an accident, before the Work is proved; the Maſter ſhall bear the loſs, and be accountable for the Price of the Work, eſpecially if it was his fault that the Work was not proved; unleſs it did appear that the Work was not ſuch as ought to be received [i].

[i] Opus quod averſione locatum eſt, donec adprobetur, conductoris periculum eſt. Quod vero ita conductum ſit, ut in pedes, menſuraſve præſtetur eatenus conductoris periculo eſt, quatenus admenſum non ſit. Et in utraque cauſa nociturum locatori, ſi per eum ſteterit, quominus opus adprobetur, vel admetiatur. Si tamen vi majore opus prius interciderit quàm adprobaretur, locatoris periculo eſt. Niſi aliud actum ſit. Non enim amplius præſtari locatori oporteat, quàm quod ſua cura atque opera conſequutus eſſet. *l.* 36. *ff. loc.* Si priuſquam locatori opus probaretur, vi aliqua conſumptum eſt, detrimentum ad locatorem ita pertinet, ſi tale opus fuit, ut probari deberet. *l.* 37. *ff. eod.* See the firſt Article of this Section, and the following Article.

IX.

9. *If the Edifice periſhes while it is building.*

If an Architect having undertaken to build a Houſe, or other Edifice, and having finiſhed it, or only a part of it, it happens to be deſtroyed by an Inundation, an Earthquake, or other Accident; the whole Loſs will fall upon the Owner: and he will notwithſtanding the loſs, be accountable both for the Materials which the Undertaker has furniſhed, and for what is due on account of the Workmanſhip. For whatever was built upon his Ground, was delivered to him. But if the Building periſhed thro' the defect of the Work, the Architect ſhall loſe his Labour, together with all the Materials that are deſtroyed; and he will likewiſe be liable for the Damage which the Maſter ſuffers on this account [k].

[k] Marcius domum faciendam à Flacco conduxerat: deinde operis parte effecta, terræ motu concuſſum erat ædificium. Maſſurius Sabinus, ſi vi naturali, veluti terræ motu, hoc acciderit, Flacci eſſe periculum. *l.* 59. *ff. loc.* Si rivum quem faciendum conduxeras, & feceras antequam eum probares, labes corrumpit: tuum periculum eſt. Paulus: imò ſi ſoli vitio id accidit, locatoris erit periculum: ſi operis vitio accidit, tuum erit detrimentum. *l. ult. eod.* Redemptores, qui ſuis cœmentis ædificant, ſtatim cœmenta faciunt eorum in quorum ſolo ædificant. *l.* 39. *ff. de rei vind.* See the firſt Article of this Section.

X.

10. *If the Workman is to furniſh every thing, and the whole periſhes.*

If the Workman was to furniſh all the Work, as in the caſe of the third Article of the ſeventh Section, and the Thing periſhes by an accident, before the Work has been delivered; the whole loſs both of the Stuff, and Faſhion, will fall upon the Workman. For this is a Sale, which is not accompliſhed, till the Workman has delivered his Work [m].

[m] *This is a conſequence of the third Article of the ſeventh Section.*

XI.

11. *Acceſſories to the Engagement of the Undertaker;*

He who has undertaken a Work, as Labour, the Carriage of ſomething, or any other thing of this kind, is not only bound to perform what is expreſly contained in the Bargain; but likewiſe to do every thing that is acceſſory to the Work, or Thing which he has undertaken. Thus, Maſters of Stage Coaches, Waggoners, and Carriers pay the Tolls, and Ferry Boats which are on the Road; for

for theſe are Charges which reſpect the Carriage[n]. But they do not pay the Cuſtoms, and other Duties which are laid upon the Goods which they carry. For theſe Duties have nothing to do with the Carriage of the Goods, but are exacted of the Owners.

[n] Vehiculum conduxiſti, ut onus tuum portaret, & ſecum iter faceret, id cùm pontem tranſiret, redemptor ejus pontis portorium ab eo exigebat. Quærebatur, an etiam pro ipſa ſola rheda portorium daturus fuerit? Puto, ſi mulio non ignoravit ea ſe tranſiturum, cùm vehiculum locaret, mulionem præſtare debere. *l.* 60. §. 8. *ff. loc.*

SECT. IX.

Of the Engagements of the perſon who gives out any Work, or Buſineſs to be done.

The CONTENTS.

1. *Engagements of the perſon who gives any Work to be done.*
2. *He owes the Price, with the Intereſt, if he is in delay.*
3. *Diſcharge from advancing the Price in caſe of danger.*
4. *If the Thing periſhes thro' ſome defect in it ſelf, or by the deed of him who gives it out.*
5. *If the Work is not done againſt the time appointed.*
6. *Of the Labourer, whoſe fault it was not that he did not work.*
7. *If the Maſter delays to receive the Work.*
8. *If the Undertaker is at any charge.*

I.

1. Engagements of the perſon who gives any Work to be done.

HE who gives out a Work to be done, is obliged to furniſh to the Undertaker that which he is bound to by the Bargain; whether it be to furniſh any Stuff, to give the Workman his Diet, or that he is obliged to any other thing.

[a] Si quid in lege conductionis convenit, ſi hoc non præſtatur, ex conducto agetur. *l.* 15. §. 1. *ff. loc.* See the firſt Article of the ſixth Section.

II.

2. He owes the Price, with the Intereſt, if he is in delay.

He ought likewiſe to pay the Price, whether it be after the whole Work is finiſhed and delivered, or in proportion to the quantity of the Work that is done, or even beforehand, according as it has been regulated by the Agreement; and if he fails to pay at the term, he ſhall be obliged to pay the Intereſt of the Price from the time of the Demand [b].

[b] *See the ſeventeenth Article of the ſecond Section.*

III.

3. Diſcharge from advancing the Price in caſe of danger.

If it was agreed that the Price of the Work, or a part of it, ſhould be paid beforehand, and afterwards there appeared to be danger in advancing the Money, he that gave out the Work cannot be compelled to advance the Money, unleſs the Undertaker gives Security [c].

[c] Quidam in municipio balineum præſtandum, annuis viginti nummis conduxerat: & ad refectionem fornacis, fiſtularum, ſimiliumque rerum, centum nummi ut præſtarentur ei, convenerat: conductor centum nummos petebat, ita ei deberi dico, ſi in earum refectionem —— impendi ſatisfaret. *l.* 58. §. 2. *ff loc.* See the twenty ſecond Article of the tenth Section of the Contract of Sale.

IV.

4. If the Thing periſhes thro' ſome defect in it ſelf, or by the deed of him who gives it out.

If a Thing that is given out to a Workman to have ſomething done to it, happens to periſh becauſe of ſome defect in the Thing it ſelf, or by ſome deed which he who gave it out ought to anſwer for; he will be liable to pay the Workman what he had done and furniſhed for the Work: as in the Caſe of the fourth Article of the eighth Section [d].

[d] *This is a conſequence of the fourth Article of the eighth Section.*

V.

5. If the Work is not done againſt the time appointed.

If it has not been the fault of the Workman, or Artificer, that the Work has not been finiſhed within the time agreed on, and that ſkilful Men be of opinion that the time allowed for finiſhing the Work was not ſufficient, he who gave it out ought to allow the time that is neceſſary, and cannot pretend any Damages for the delay, even altho' they had been ſtipulated in caſe the Work were not done within the time; for no Covenant obliges people to that which is impoſſible [e]. But if the Work was promiſed againſt a certain day, and for a Uſe which could not admit of delay, as if it was to be ſold at ſuch a Fair, or to be ready for ſuch an Imbarkation; the Undertaker would be liable to make good the damages of the Delay, and ought to blame himſelf for having undertaken what he was not able to perform.

[e] In operis locatione erat dictum, ante quam diem effici deberet. Deinde ſi ita factum non eſſet, quanti locatoris interfuiſſet, tantam pecuniam conductor promiſerat. Eatenus eam obligationem contrahi puto quatenus vir bonus de ſpatio temporis æſtimaſ-

æſtimaſſet, quia id actum apparet eſſe, ut eos ſpatio abſolveretur, ſine quo fieri non poſſit. *l.* 58. §. 1. *ff. loc. v. l.* 13. §. 10. *eod.* See the ſixth Article of the fifth Section of Covenants, the twelfth Article of the twelfth Section, and the nineteenth Article of the ſecond Section of the Contract of Sale.

VI.

6. Of the Labourer, whoſe fault it was not, that he did not work.

If it has not been the fault of the Labourer, that he did not do the Work, or perform the Service which he had promiſed within a certain time; and that during that time he has not been imployed any other way; he who engaged him in his Service, is bound to pay the Salary for the time which he has made the Labourer loſe[f].

[f] Qui operas ſuas locavit, totius temporis mercedem accipere debet, ſi per eum non ſtetit quominus operas præſter. *l.* 38. *ff. loc.* Cùm per te non ſtetiſſe proponas, quominus locatas operas Antonio Aquilæ ſolveres, ſi eodem anno mercedes ab alio non accepiſti, fidem contractus impleri æquum eſt, *l.* 19. §. 9. *eod.* Diem functo legato Cæſaris, ſalarium comitibus reſidui temporis præſtandum, modò ſi non poſtea comites cum aliis eodem tempore fuerunt. *d. l.* 19. §. *ult. v. l.* 61. §. 1. *ff. loc.*

VII.

7. If the Maſter delays to receive the Work.

If he who gave out the Work to be done, delays to receive it after it is finiſhed, or refuſes it without a good reaſon, and the thing periſhes after his delay, he ſhall nevertheleſs be bound to pay the price of the Work[g].

[g] Nociturum locatori ſi per eum ſteterit quominus opus approbetur. *l.* 36. *ff. loc.*

VIII.

8. If the Undertaker is at any charge.

If beſides the Workmanſhip, the Workman, or Undertaker, has been at any expence in preſerving the thing, the perſon who gave the Work out, ſhall be bound to reimburſe him[h].

[h] *See the ſeventh Article of the third Section.*

SECT. X.

Of Leaſes for Perpetuity, or for a long Term of Years.

The ſubject matter of this Section.

EMphyteutical Leaſes, or Leaſes for Perpetuity, or a long Term of Years, have been a conſequence of the Leaſes of Farms. For ſince the Owners of barren Lands, could not eaſily find Tenants for them, a way was invented, to give in Perpetuity ſuch kind of Lands, on condition that the Grantee ſhould cultivate, plant, and otherwiſe improve them, as the word *Emphyteuſis* ſignifies. By this Agreement, the Proprietor finds on his part his account, by aſſuring to himſelf a certain and perpetual Rent: And the perpetual Tenant finds likewiſe his advantage, in laying out his Labour, and Induſtry, to change the face of the Ground, and to make it fruitful.

Seeing the matter of Emphyteutical or Perpetual Leaſes, takes in Quit-Rents, and other kinds of Ground-Rents, and that the conditions of perpetual Tenants are different, according to the diverſity of their Grants, and according to the Cuſtom and Uſage of Places, we are not to enter here into the detail of this matter. Thus, we ſhall not inſert here the Rules of Law concerning Fines of Alienation, nor thoſe which relate to the Right which the Lord of a Mannor has on Lands that are part of his Mannor, which are different in different Countries, but ſhall confine our ſelves to ſuch Rules as are of the *Roman* Law. And we ſhall lay down only the general Principles, which are both agreeable to the *Roman* Law, and to our Uſage, ſuch as are obſerved in all the Cuſtoms, and are the fundamental Maxims of the Law touching this matter.

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1. *Definition of Perpetual Leaſes.*
2. *All Lands may be let out upon Leaſes for Perpetuity.*
3. *Difference between perpetual and other kinds of Leaſes.*
4. *Perpetuity of the Emphyteutical Leaſe.*
5. *The perpetual Leaſe ſhares the Rights of Property.*
6. *Property direct and uſeful.*
7. *Mutual Engagements which reſult from the Perpetual Leaſe.*
8. *Who bears the Loſſes occaſioned by accidents.*
9. *The perpetual Tenant cannot commit Waſte.*
10. *The perpetual Leaſe vacated for Non-Payment of the Rent.*
11. *The Expences are not refunded.*

I.

1. Definition of perpetual Leaſes.

A Perpetual, or Emphyteutical Leaſe, is a Contract by which the Owner of an Eſtate in Land gives it to a Tenant to cultivate and improve it[a]; and to enjoy it and diſpoſe of it for ever[b], on condition that the Tenant pay him a certain Rent in Money, Corn, or other kind[c], and that he bear the other Charges which they agree on.

[a] *This is what is meant by* Jus Emphyteuticum, *which is the word uſed in the Title of this matter, which denotes that the Lands are given to the Tenant,*

that he may cultivate, plant, and improve them. Meliorationes *ſuperviacuas. l.* 3. *C. de jur. emphyt.*

[a] Ut bene de prædiis, quæ perpetuò quibuſdam fruenda tradantur. Id eſt, ut quamdiu penſio, ſive reditus pro his domino præſtetur, neque ipſi conductori, neque hæredi ejus, cuive conductor, hæreſve ejus id prædium vendiderit, aut donaverit, aut dotis nomine dederit, aliove quocumque modo alienaverit, auferre liceat. §. 3. *inſt. de locat. & cond. l.* 1. *ff. ſi ager vect. id eſt, emphyt. pet. l.* 1. *C. de adm. rer. publ.*

[c] Domini prædiorum id quod terra præſtat accipiant, pecuniam non requirant, quam ruſtici optare non audent; niſi conſuetudo prædii hoc exigat. *l.* 5. *C. de agric. & cenſ.* Penſio, ſive reditus pro his domino præſtetur. §. 3. *inſt. de locat. & cond.* Reditus in auro, & ſpeciebus. *l.* 2. §. 2. *C. de agric. & cenſ.*

II.

2. All Lands may be let out upon Leaſes for Perpetuity.

Altho' the *Emphyteuſis* ſeems to be reſtrained by its primitive Inſtitution, to barren Lands, yet Leaſes for Perpetuity are given of Lands which are fruitful, and in a good condition. And ſuch Leaſes are likewiſe granted of Poſſeſſions which of their own nature produce no manner of Fruit, but which yield other Revenues; ſuch as Houſes, and other Buildings [d].

[d] Loca omnia fundive reipublicæ —— perpetuariis conductoribus locentur. *l.* 3. *C. de locat. præd. civil.* Vectigales ædes. *l.* 15. §. 26. *ff.* de damno infecto. Suburbanum, aut domum. *Nov.* 7. *C.* 3. §. 2.

III.

3. Difference between perpetual and other kinds of Leaſes.

Perpetual Leaſes are diſtinguiſhed from the common Leaſes of Farms [e], by two eſſential characters, which are the foundation of the Rules that are peculiar to Perpetual Leaſes. The firſt is the Perpetuity of the Leaſe [f]; and the ſecond is the tranſlation of a kind of Property [g].

[e] Sed talis contractus quia inter veteres dubitabatur, & à quibuſdam locatio, à quibuſdam venditio exiſtimabatur: lex Zenoniana lata eſt, quæ Emphyteuſeos contractus propriam ſtatuit naturam, neque ad locationem, neque ad venditionem inclinantem: ſed ſuis pactionibus ſufficiendam. §. 3 *inſt. de locat. & cond.* Jus Emphyteuticarium neque conductionis, neque alienationis eſſe titulis adjiciendum. Sed hoc jus tertium eſſe conſtituimus ab utriuſque memoratorum contractuum ſocietate, ſeu ſimilitudine ſeparatum, conceptionem, definitionemque habere propriam. *l.* 1. *C. de jur. Emphyt.*

[f] Perpetuò quibuſdam fruenda. §. 3. *inſt. de locat. & cond.* Perpetuarii, hoc eſt, Emphyteuticarii juris. *l.* 1. *C. de off. comit. ſacr. pal. l.* 1. *& 5. C. de locat. præd. civil. l.* 10. *Cod. de loc. & cond.*

[g] Emphyteuticarii fundorum domini, *l.* 12. *C. de fund. patr.* See the following Articles.

There are ſome Emphyteutical Leaſes which are not perpetual, but only for a long Term of Years, ſuch as a Hundred, or Ninety Nine years.

IV.

4. Perpetuity of the Emphyteutical Leaſe.

The perpetuity of the Emphyteutical Leaſe makes it to paſs, not only to the Heirs of the perpetual Tenant, but likewiſe to all thoſe who ſucceed to his Right, whether by Donation, Sale, or any other kind of Alienation. And they can never be diſpoſſeſſed by the Owner of the Lands, and his Succeſſors [h], unleſs in the caſes which ſhall be explained in this Section.

[h] Neque hæredi ejus, cuive conductor, hæreſve ejus id prædium vendiderit, aut donaverit, aut dotis nomine dederit, aliove quocumque modo alienaverit, auferre liceat. §. 3. *inſt. de locat. & cond.*

V.

5. The Perpetual Leaſe ſhares the Rights of Property.

The tranſlation of Property which is made by a Perpetual Leaſe, is proportioned to the nature of this Contract, where the Owner gives the Lands and reſerves the Rent. And by this Covenant, there is made as it were a Partition of the Rights of Property between the Owner of the Lands, and the perpetual Tenant. For the Owner who grants the perpetual Leaſe, remains Maſter in ſo far as to enjoy the Rent which he has reſerved, as the Fruit of his own proper Lands, by which he retains the chief right of Property, which is that of enjoying the Thing as Owner of it, together with the other Rights which he has reſerved to himſelf. And the perpetual Tenant, on his part, acquires the Right of tranſmitting the Eſtate to his Sceceſſors for ever, of ſelling it, giving it away, alienating it, with the Burden of the Rights which the Leſſor of the Lands has reſerved to himſelf; as alſo a right to plant, to build, and to make what other changes he ſhall think proper, for improving the Eſtate, which are ſo many Rights of Property [i].

[i] Jus Emphyteuticarium neque conductionis, neque alienationis eſſe titulis adjiciendum: ſed hoc jus tertium eſſe conſtituimus. *l.* 1. *C. de jur. emphyt.* Penſio ſive reditus domino præſtetur. §. 3. *inſt. de loc. & cond.* Emphyteuticarii fundorum domini. *l.* 12. *C. de fund. patrim.* Cui conductor, hæreſve ejus id prædium vendiderit, donaverit, aliove quocumque modo alienaverit. §. 3. *inſt. de loc. & cond.*

VI.

6. Property direct and uſeful.

The Rights of Property which the Maſter retains, and thoſe which are conveyed to the perpetual Tenant, are commonly diſtinguiſhed by the names of *Direct Property*, which is given to the Right of the Maſter; and *Uſeful Property*, which is given to the Right of the Tenant. The meaning of which is, that the firſt Maſter of the Eſtate retains his Original Right of Property, except in ſo far as he tranſmits a ſhare of it to the perpetual Tenant; and that

the perpetual Tenant acquires the Right of enjoying and diſpoſing of the Eſtate, with the burden of the Rights that are reſerved to the Maſter of the Lands. And it is for this Reaſon, that in the *Roman* Law, the perpetual Tenant is conſidered in a double capacity, either as being, or not being the Maſter of the Eſtate, according to the different views, and the different effects of theſe two kinds of Property[l].

[l] Emphyteuticarii, fundorum domini. *l.* 12. *C. de fund. patrim.* quamvis non efficiantur domini. *l.* 1. §. 1. *ff. ſi ager vectig. id eſt emphyt. petat.*

VII.

7. *Mutual Engagements which reſult from the Perpetual Leaſe.*

The perpetual Tenant, on his part, is obliged to pay the perpetual Rent, and to perform the other conditions regulated by his Leaſe, and by Cuſtom; ſuch as the duty of Fines of Alienation which thoſe perſons are bound to pay, who come into the Eſtate of the perpetual Tenant, either upon all kinds of changes of a Tenant, or upon ſome, or only upon Sales, according as it is regulated by the Leaſe, or by Cuſtom; the Right of Pre-emption, when the perpetual Tenant has a mind to ſell the Eſtate, and others of the like nature. And he who grants the perpetual Leaſe, is obliged, on his part, to warrant the Eſtate, and to take it back, and diſcharge the perpetual Tenant of the Rent, if he finding it too hard is willing to give it up[m].

[m] Lex Zænoniana lata eſt, quæ emphyteuſeos contractûs propriam ſtatuit naturam—— ſuis pactionibus fulciendam. Et ſi quidem aliquid pactum fuerit, hoc ita obtinere. §. 3. *inſt. de loc. & cond.*

Jus Emphyteuticarium—— ſeparatam conceptionem, definitionemque habere propriam, & juſtum eſſe validumque contractum, in quo cuncta, quæ inter utraſque contrahentium partes, ſuper omnibus pactionibus ſcriptura interveniente habitis placuerint, firma illibataque perpetua ſtabilitate, modis omnibus debeant cuſtodiri. *l.* 1. *C. de jur. Emphyt. l.* 2. *eod.*

See the Origine of the Right of Fines of Alienation, of the Right of Redemption and Pre-emption in the third Law of the ſame Title.

The perpetual Tenant has a right to give up the Eſtate to the direct Lord of the Lands, if he finds himſelf overcharged by the Rent. There is nothing ſaid here of the Rules concerning this matter, which are eſtabliſhed by Cuſtom. It is ſufficient to remark, that this Right is founded on the Loſſes, or Diminutions which may happen to the Eſtate, and on the Injuſtice that it would be to force the Tenant to pay a perpetual, and exceſſive Rent, if the Eſtate were not able to afford it; ſince in Leaſes for a few Years, eaſes and abatements of the Rent are granted to Farmers, becauſe of the diminution of the Fruits of the Ground. See the following Article.

VIII.

8. *Who bears the loſſes occaſioned by Accidents.*

It follows from the Nature of theſe Perpetual Leaſes, that all the Accidents which deſtroy only the Revenues, or the Improvements made by planting, building, and others of what kind ſoever they be, that are made by the perpetual Tenant, are to his loſs. For he was obliged to make Improvements, and it was for his behoof that the Eſtate was improved. And the Accidents which deſtroy the Lands, fall both upon the Maſter, who ſuffers the loſs of his Eſtate, and likewiſe on the perpetual Tenant, who loſes the Improvements which he had made upon it[n].

[n] Si interdum ea quæ fortuitis caſibus eveniunt, pactorum non fuerint conventione concepta, ſi quidem tanta emerſerit clades, quæ prorſus etiam ipſius rei quæ per Emphyteuſim data eſt faciat interitum, hoc non Emphyteuticario, cui nihil reliquum permanſit, ſed rei domino, qui, quod fatalitate ingruebat, etiam nullo intercedente contractu habiturus fuerat, imputetur. Sin verò particulare, vel aliud leve contigerit damnum, ex quo non ipſa rei penitus lædatur ſubſtantia, hoc Emphyteuticarius ſuis partibus non dubitet adſcribendum. *l.* 1. *C. de jur. Emphyt.* §. 3. *inſt. de loc. & cond.*

We have not ſet down in this Article the caſe of the Loſs of a part of the Lands, as if an Inundation has carried off the half, or more, or leſs of the Eſtate. For altho' what remains is liable for the whole Rent, yet the liberty which the perpetual Tenant has of yielding up the Eſtate to the Maſter, puts it in his power to free himſelf of the Rent by abandoning the Eſtate, or that which remains of it, in the condition in which he ought to reſtore it, purſuant to the Rules eſtabliſhed for caſes of this kind.

IX.

9. *The perpetual Tenant cannot commit Waſte.*

It is likewiſe a conſequence of the Nature of Perpetual Leaſes, that the perpetual Tenant cannot commit waſte, or damage the Eſtate, nor even take away the Improvements which he had made upon it. And if he commits Waſte, the Maſter of the Lands may get the perpetual Leaſe to be vacated, may enter again to the poſſeſſion of his Eſtate, and oblige the Tenant to repair what has been waſted. But the perpetual Tenant may make what changes are uſeful, and ſuch as any careful and diligent Maſter would do; ſuch as the cutting down of old Trees, in order to plant new ones, the demoliſhing that which is falling to decay, in order to rebuild it; and others of the like nature.

[o] Si quidem deterius fecerit prædium, aut ſuburbanum aut domum qui emphyteuſim percepit, cogi eum de ſuo diligentiam, ac reſtitutionem priſci ſtatus facere. *Nov.* 7. *cap.* 3. §. 2. Si verò quis aut locator aut emphyteuta—— deteriorem faciat rem—— damus licentiam venerabili domui—— antiquum ſtatum locatæ, ſive emphyteuticæ rei exigere, & ejicere de emphyteuſi. *Nov.* 120. *c.* 8. Si quid inædificaverit, poſtea eum neque tollere hoc, neque refigere poſſe. *l.* 15. *ff. de uſufr.*

Altho' this Law relates to the Uſufructuary, yet it may with much greater reaſon be extended to the perpetual Tenant, who poſſeſſes only on condition that he do improve the Lands.

X. This

X.

10. *The perpetual Lease vacated for Non-Payment of the Rent.*

This is alſo another conſequence of the Nature of Perpetual Leaſes, that in caſe of Non-Payment of the Rent, the perpetual Tenant may be ejected, even altho' there were no Clauſe for vacating the Leaſe in this caſe [p], unleſs he makes payment within the time limited by the Judge [q].

[p] Sancimus ſi quidem aliquæ pactiones in emphyteuticis inſtrumentis fuerint conſcriptæ, eaſdem & in omnibus aliis capitulis, obſervari: & de rejectione ejus qui emphyteuſim ſuſcepit, ſi ſolitam penſionem vel publicarum functionum apochas non præſtiterit. Sin autem nihil ſuper hoc capitulo fuerit pactum, ſed per totum triennium neque pecunias ſolverit, neque apochas domino tributorum reddiderit, volenti ei licere eum à prædiis emphyteuticariis repellere. *l.* 2. *C. de jure emphyt. Nov.* 7. *c.* 3. §. 2. *Nov.* 120. *cap.* 8.

[q] *See the eighth Article of the third Section of the Contract of Sale, and the twelfth and thirteenth Articles of the twelfth Section of the ſame Title.*

XI.

11. *The Expences are not refunded.*

If the perpetual Tenant has made Improvements on the Eſtate, and is ejected for default of payment of the Arrears of his Rent; he cannot pretend to be reimburſed his Expences [r]. For the Eſtate was given him on condition that he ſhould improve it. But it will be prudent for the Judge, to grant, according to the quality of the Improvements, and the other circumſtances, a reaſonable Delay, that the perpetual Tenant may be thereby in a condition, either to pay what he is in Arrear, and to retain the Eſtate, or be able to ſell it [s].

[r] Nulla ei in poſterum allegatione nomine meliorationis, vel eorum quæ emponemata dicuntur, vel pœna opponenda. *l.* 2. *C. de jur. emph.*

[s] Licentia emphyteutæ detur, ubi voluerit, & ſine conſenſu domini, meliorationes ſuas vendere. *l.* 3. *eod.*

Altho' the words of this Law do not concern the preſent caſe; yet they may be applied to it; becauſe it is always true that the perpetual Tenant may ſell the Eſtate, and the Improvements made on it. And it is but juſt to grant him a delay for uſing this Right, in the caſe where he would loſe his Improvements for not paying the Rent.

TITLE V.

Of the Loan of THINGS to be reſtored in Specie, and of a Precarious Loan.

OUR Language having no proper word whereby to expreſs this Contract which the *Romans* call *Commodatum*, where one lends a thing to another gratuitouſly, that he may uſe it, and reſtore it after he has done with it; we have expreſs'd this Contract by a Circumlocution, calling it the Loan of things that are to be reſtored in Specie, that it may be diſtinguiſhed from the Loan of Money, and other things which may be repaid in kind, to which Contract the *Romans* gave the name of *Mutuum*, and of which we ſhall treat in the following Title. For theſe are two different Covenants, which are not to be blended together; the Covenant which is explained under this Title, obliging the Borrower to reſtore the ſame Individual Thing which he borrowed, as when one borrows a Horſe; and the other Covenant obliging the Borrower to reſtore a thing of the ſame kind, as when one borrows Money, and other things which we ceaſe to have in our poſſeſſion, when we make uſe of them.

The Loan of things that are to be reſtored in Specie, is a Contract which reſults naturally from the Union which Society eſtabliſhes among Mankind. For ſince men have not always the means of buying, or hiring all the things which they ſtand in need of, and which they want only for a little time; Humanity obliges them to aſſiſt one another with the Loan of ſuch things as they ſtand in need of.

A Precarious Loan is the ſame kind of Contract with the Loan of things that are to be reſtored in Specie, and differs from it only in this, according to the *Roman* Law, that whereas the Loan of things to be reſtored in Specie is for a time proportioned to the neceſſity of the Borrower, or even for a certain time regulated by the Contract; the Precarious Loan is undetermined, and laſts no longer than it pleaſes the Lender.

This diſtinction between the Loan of things to be reſtored in Specie, and the precarious Loan, is not much in uſe with us; and we make but little uſe of this word *precarious*, except in Immoveables, as in a Sale, or other Alienation, when he who alienates an Eſtate, acknowledges that if he remain in poſſeſſion of it, it ſhall only be precariouſly. Which is expreſſed in this manner, to denote that he ſhall not hereafter poſſeſs his Eſtate, but by permiſſion from the purchaſer, and in the ſame manner as he poſſeſſes a thing who has borrowed it. See the ſeventh Article of the ſecond Section of the Contract of Sale.

SECT. I.

Of the Nature of the Loan of Things to be reſtored in Specie, and of a Precarious Loan.

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2. *A Precarious Loan.*
3. *The Loan does not oblige, but by the delivery of the thing.*
4. *The Lender remains Proprietor of the thing.*
5. *Moveables and Immoveables may be lent in this way.*
6. *Of Things which are conſumed by their uſe.*
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8. *The Lender is to regulate the manner and time of the uſe.*
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13. *The Precarious Loan ends by the death of the Lender.*
14. *Who may borrow and lend.*
15. *The Engagements of the Loan paſs to the Heirs, or Executors.*

I.

1. *Definition of this Loan.*

THE Loan of Things that are to be reſtored in ſpecie, is a Covenant by which one gives a thing to another, that he may put it to a certain uſe, and keep it as long as his occaſions require, without paying any price for the uſe of it. For if there were a Price, it would be a Letting to Hire[a].

[a] Utendum datum. *l.* 1. §. 1. *ff. commod.* Res aliqua utenda datur. §. 2. *inſt. quib. mod. re contr. obl.*

Commodata res tunc propriè intelligitur, ſi nulla mercede accepta, vel conſtituta, res utenda data eſt. Alioqui mercede interveniente, locatus tibi uſus rei videtur. Gratuitum enim debet eſſe commodatum. *d.* §. 2. *inſt. quib. mod. re contr. obl.*

II.

2. *A Precarious Loan.*

A Precarious Loan, is when a thing is lent at the deſire of the perſon who borrows it, to be uſed during the time that the Lender is willing to let him have it; and on condition that he ſhall reſtore it whenever the Owner is pleaſed to call for it[b].

[b] Precarium eſt, quod precibus petenti utendum conceditur tamdiù, quamdiù is qui conceſſit, patitur. *l.* 1. *ff. de prec. l.* 2. §. *ult. eod.* Qui precario concedit, ſic dat, quaſi tunc recepturus, cum ſibi libuerit precarium ſolvere. *d. l.* 1. §. 2.

III.

3. *The Loan does not oblige, but by the delivery of the thing.*

The Loan of things that are to be reſtored in Specie, is one of thoſe kinds of Covenants, whereby one obliges himſelf to reſtore a thing, and conſequently where the Obligation is not contracted, but by the delivery of the Thing borrowed[c].

[c] Is cui res aliqua utenda datur, id eſt commodatur, re obligatur. §. 2. *inſt. quib. mod. re contr. obl.*

See the ninth Article of the firſt Section of Covenants.

IV.

4. *The Lender remains Proprietor of the thing.*

It is the nature of this Contract, that the Lender remains Proprietor of the Thing which he lends, and conſequently that the Borrower is obliged to reſtore the ſame individual Thing which he has borrowed, and not another of the ſame kind. For otherwiſe it would not be a Loan of things to be reſtored in ſpecie, but another kind of Loan, as where one borrows Proviſions, or Money, to conſume them, and to reſtore as much of the ſame kind[d].

[d] Rei commodatæ & poſſeſſionem, & proprietatem retinemus. *l.* 8. *ff. commod.* Nemo enim commodando, rem facit ejus cui commodat. *l.* 9. *eod.* Mutuum damus recepturi, non eandem ſpeciem, quam dedimus: alioqui commodatum erit, aut depoſitum. *l.* 2. *ff. de reb. cred.*

V.

5. *Moveables and Immoveables may be lent in this way.*

We may lend in this way, not only Moveable Things, but likewiſe Immoveables, ſuch as a Houſe to dwell in[e].

[e] Rem mobilem. *l.* 1. §. 1. *ff. commod.* Commodata res dicitur & quæ ſoli eſt. *d. l.* 1. §. 1. Etiam habitationem commodari poſſe. *d.* §. 1. *in fine. l.* 17. *ff. de præſc. verb.*

VI.

6. *Of Things which are conſumed by their uſe.*

We cannot lend in this way, Things which are conſumed, or which ceaſe to be by being uſed, ſuch as Money and Proviſions; for to lend them in order to conſumption, would be a Contract of another nature; that is, a Loan where the things lent are not to be reſtored in Specie, but in Kind. But we may lend theſe kinds of Things, ſo as to have them reſtored in Specie, if we lend them for any other uſe than that of Conſumption:

tion: As if we lend Money to make a Tender, or to depoſite, on condition that the Borrower take it up again, and reſtore the ſame in Specie[f].

[f] Non poteſt commodari id quod uſu conſumitur, niſi forte ad pompam, vel oſtentationem quis accipiat. *l.* 3. §. *ult. ff. commod.* Sæpe etiam ad hoc commodantur pecuniæ, ut dicis gratia, numerationis loco intercedant. *l.* 4. *eod.*

See the fourth Article of the firſt Section of Letting and Hiring.

VII.

7. *The Loan of that which is another's.*

We may lend that which is not our own. Thus, he who poſſeſſes a thing honeſtly, may lend what he poſſeſſes, and what he believes to be his own. And it is alſo a Loan of this kind, when one lends that which he poſſeſſes knaviſhly, knowing it to belong to another[g].

[g] Commodare poſſumus etiam alienam rem quam poſſidemus, tametſi ſcientes alienam poſſidemus. *l.* 15. *ff. commod.* Ita ut, & ſi fur, vel prædo commodaverit, habeat commodati actionem. *l.* 16. *eod. l.* 64. *ff. de Judic.*

VIII.

8. *The Lender is to regulate the manner and time of the uſe.*

It belongs to him that lends the Thing to regulate in what manner, and for what time, the Borrower is to have the uſe of it[h].

[h] Modum commodati finemque præſcribere, ejus eſt, qui beneficium tribuit. *l.* 17. §. 2. *ff. commod.* See the eleventh Article of the ſecond Section.

IX.

9. *The Loan is preſumed to be for the natural uſe of the thing.*

If the uſe to which the thing borrowed is to be imployed, be not regulated by the Contract, it is limited to the natural and ordinary ſervice that may be had from it. Thus, he who lends a Horſe, is preſumed to lend him for a Journey, and not for the War[i].

[i] Qui alias re commodata utitur; non ſolùm commodati, verùm furti quoque tenetur. *l.* 5. §. 8. *ff. commod.* Si tibi equum commodavero, ut ad villam adduceres, tu ad bellum duxeris, commodati teneberis. *d. l.* 5. §. 7.

X.

10. *The continuance of the Loan is proportioned to the uſe for which the thing is lent.*

If the time of the Loan is not regulated by the Contract, it is limited to the continuance of the uſe for which the thing is lent. Thus, a Horſe being lent for a Journey, he who borrows him has the uſe of him during the time that is neceſſary for performing the ſaid Journey[l].

[l] Intempeſtivè uſum commodatæ rei auferre, non officium tantùm impedit, ſed & ſuſcepta obligatio inter dandum accipiendumque. *l.* 17. §. 3. *ff. commod.* Non rectè facies importunè repetendo. *d.* §. Temporalis miniſterii cauſa. *l.* 2. *C. eod.* See the firſt Article of the third Section.

XI.

11. *Reſtitution of the thing at the time and place agreed on.*

If it has been agreed, that the Thing lent ſhall be reſtored within ſuch a time, and at ſuch a place, and the Borrower fails to perform what he promiſed, he ſhall be liable for the Damages which he has been the cauſe of according to the circumſtances[m].

[m] Si ut certo loco vel tempore reddatur commodatum, convenit, officio judicis ineſt, ut rationem loci, vel temporis habeat. *l.* 5. *ff. commod.*

XII.

12. *A Loan may be either for the conveniency of the Borrower, or Lender, or both.*

A Thing may be lent, either for the bare intereſt of the Borrower; and this way of lending is the moſt uſual; as if I lend my Horſe to a Friend, to make a journey for his own buſineſs: or it may be lent for the mere behoof of the Lender; as if I lend my Horſe to one whom I employ to go into the Country about my affairs: or the Loan may be for the common advantage both of Borrower and Lender; as if a Partner lends his Horſe to his Co-Partner, to go and look after the common concerns of the Company[n].

[n] Commodatum plerumque ſolam utilitatem continet ejus cui commodatur. *l.* 5. §. 2. *in f. ff. commod.*

Si ſua duntaxat cauſa commodavit: ſponſæ fortè ſuæ, vel uxori quo honeſtius culta ad ſe deduceretur: vel ſi quis ludos edens Prætor, ſcenicis commodavit. *d. l.* 5. §. 10; *l.* 10. §. 1. *eod.*

Si utriuſque gratia (commodata ſit) res, veluti ſi communem amicum ad cœnam invitaverimus, tuque ejus rei curam ſuſcepiſſes, & ego tibi argentum commodaverim. *l.* 18. *eod.* See the ſecond and following Articles of the ſecond Section.

XIII.

13. *The Precarious Loan ends by the death of the Lender.*

A Precarious Loan is at an end by the death of the Lender, but it is not ſo with the ordinary Loan of Things. For the Precarious Loan laſts no longer than the Lender is willing it ſhould: and his will ceaſes by his death. But in the ordinary Loan, the Lender agreed to leave the thing with the Borrower, all the time that ſhould be neceſſary for that uſe to which he lent it[o].

[o] Precarii rogatio ita facta, quoad is qui dedit vellet, morte ejus tollitur. *l.* 4. *ff. locati.* See the third Section of this Title, Art. 1. *l.* 17. §. 3. *ff. commod.*

XIV.

14. *Who may borrow and lend.*

All perſons who are capable of contracting, may lend and borrow; and beſides the natural Engagements to which this kind of Loan obliges the Parties, they may add what other Covenants they pleaſe; and we muſt apply to this

Contract

Contract the other general Rules of Covenants [p].

[p] *See the third Article of the second Section, the first Article of the third Section, and the first Article of the fourth Section of Covenants. V. l. 1. §. 2. & l. 2. ff. commod.*

XV.

15. *The Engagements of the Loan paſs to the Heirs, or Executors.*

The Engagements which are formed by the Loan, paſs to the Heirs, or Executors of the Lender, and of the Borrower [q].

[q] Hæres ejus qui commodatum accepit pro ea parte qua hæres eſt, convenitur. *l.* 3. §. 3. *ff. commod. l.* 17. §. 2. *eod.* See touching the engagement of the Heir or Executor, the twelfth Article of the third Section of a *Depoſitum*.

SECT. II.

Of the Engagements of the Borrower.

The CONTENTS.

1. *Engagements of the Borrower.*
2. *What care the Borrower is obliged to take.*
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14. *Expence laid out for the uſe of the thing.*

I.

1. *Engagements of the Borrower.*

THE Engagements which he is under, who borrows a thing, are to take care of it [a], to uſe it according to the intention of the Lender [b], and to reſtore it [c] at the time appointed [d], and in good caſe [e]. Theſe ſeveral Engagements ſhall be explained by the Rules which follow.

[a] In rebus commodatis diligentia præſtanda eſt. *l.* 18. *ff. commod.*

[b] Modum commodati, finemque præſcribere, ejus eſt, qui beneficium tribuit. *l.* 17. §. 3. *ff. commod.*

[c] De ea re ipſa reſtituenda tenetur. §. 2. *inſt. quib. mod. re contr. obl. l.* 1. §. 3. *ff. de obl. & act.*

[d] Ad modum finemque. *l.* 17. §. 3. *ff. commod.*

[e] Si reddita quidem ſit res commodata, ſed deterior reddita, non videbitur reddita. *l.* 3. §. 1. *ff. commod.*

II.

2. *What care the Borrower is obliged to take.*

He who has borrowed a thing for his own uſe, is obliged to take care of it, not only as he takes care of what is his own, if he is not careful enough in his own concerns, but with all the exactneſs that is uſually obſerved by the moſt diligent perſons; and he is to anſwer for all the Loſs and Damage that may happen for want of ſuch a due care [f]. For ſeeing he has the free and gratuitous uſe of that which is lent him, he ought to preſerve it with all the circumſpection that is poſſible to be uſed by the moſt careful perſons.

[f] In rebus commodatis talis diligentia præſtanda eſt, qualem quiſque diligentiſſimus pater familias ſuis rebus adhibet. *l.* 18. *ff. commod.* Exactiſſimam diligentiam cuſtodiendæ rei præſtare compellitur. Nec ſufficit ei, eandem diligentiam adhibere, quam ſuis rebus adhibet, ſi alius diligentior cuſtodire potuerit. *l.* 1. §. 4. *ff. de obl. & act.* §. 2. *inſt. quibus mod. re contr. obl.* Cuſtodiam commodatæ rei, etiam diligentem debet præſtare. *l.* 5. §. 5. *ff. commod.* See the fourth Article of the third Section of a *Depoſitum*, and the third Article of the eighth Section of Letting and Hiring.

There is this difference in the Roman *Law, between the ordinary Loan of Things to be reſtored in Specie, and a Precarious Loan, as to the care that is to be taken by the Borrower, that in the Precarious Loan, he who poſſeſſes precariouſly the thing belonging to another, is accountable only for what he does fraudulently, and for the faults which come near to Fraud, and not for ſlender faults.* Dolum ſolum præſtat is qui precario rogavit, cùm totum hoc ex liberalitate deſcendat ejus qui precariò conceſſit: & ſatis ſit ſi dolus tantùm præſtetur. Culpam tamen dolo proximam contineri quis meritò dixerit. *l.* 8. §. 3. *ff. de precar. But the liberality of the Lender, ought it to diminiſh the care of the Borrower? And whoever lends, whether it be for a certain time, or precariouſly, does he lend for any other end than to do a favour to the Borrower? Or if we muſt needs diſtinguiſh their condition, as to the care of the thing lent, is it not becauſe he to whom the thing is lent for a certain time, ought to be more careful in preſerving the thing, than he to whom it is lent indefinitely, who knows not how long the Lender will be pleaſed to let him have the uſe of it?*

III.

3. *What care he is obliged to, who borrows the thing for*

If the thing has been lent only for the intereſt of the Lender, he who has borrowed it on this account, will not be bound to take the ſame care of it as if he had borrowed it for his own pro-

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per uſe. But he ſhall be bound only for what may happen thro' his Knavery [g], or thro' any groſs fault that is next door to Fraud [h]. For it would not be reaſonable, that to do ſervice to another, he ſhould be obliged to ſuch a ſtrict care, as to be anſwerable for the leaſt Neglect, or the ſmalleſt Fault.

[g] Interdum planè dolum ſolum in re commodata, qui rogavit, præſtabit: ut putà ſi quis ita convenit, vel ſi ſua dumtaxat cauſa commodavit. *l.* 5. §. 10. *l.* 10. §. 1. *ff. commod.*

[h] Lata culpa planè dolo comparabitur. *l.* 1. §. 1. *ff. ſi mens. falſ. mod. dix.* diſſoluta negligentia prope dolum eſt. *l.* 29. *ff. mand.*

IV.

4. What care he is obliged to, who borrows for the Lender's intereſt, as well as his own.

If the thing has been lent for the common intereſt both of Lender and Borrower; as if one Partner borrows the Horſe of his Co-Partner, to go and look after any affair in which the Company is concerned, he ſhall anſwer for what falls out, not only thro' his Knavery, but thro' his Neglect, and his want of Care [i]. For he borrows partly for his own Intereſt, and he receives a favour in a matter that concerns him.

[i] At ſi utriuſque (gratia commodata ſit res) ſcriptum quidem apud quoſdam invenio, quaſi dolum tantum præſtare debeas. Sed videndum eſt ne & culpa præſtanda ſit: ut ita culpæ fiat æſtimatio, ſicut in rebus pignori datis, & dotalibus æſtimari ſolet. *l.* 18. *verſic.* at ſi *ff. commod.* Ubi utriuſque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in ſocietate, & dolus & culpa præſtatur. *l.* 5. §. 2. *ff. commod.* Placuit (in pignore) ſufficere, ſi ad eam rem cuſtodiendam exactam diligentiam adhibeat. §. *ult. inſt. quib. mod. re contr. oblig.*

V.

5. If the Contract regulates the care that is to be taken.

If it has been agreed what care the Borrower ſhall be obliged to take of the thing lent, the Agreement ſhall ſerve as a Rule [k].

[k] Sed hæc ita, niſi ſi quid nominatim convenit, vel plus, vel minus in ſingulis contractibus: nam hoc ſervabitur quod initio convenit, legem enim contractus dedit. *l.* 23. *ff. de reg. jur.* Interdum planè dolum ſolum in re commodata, qui rogavit præſtabit: ut puta ſi quis ita convenit. *l.* 5. §. 10. *ff. commod.*

VI.

6. Accidents.

If the Borrower has uſed the thing which he borrowed, only during the time, and for the purpoſe for which it was lent him, and the thing periſhes, or is damaged, without his fault, by the bare effect of ſome accident, or becauſe of the nature of the Thing itſelf; he is not anſwerable for it. For no blame can be laid at his door. And no Covenant obliges naturally to anſwer for theſe ſorts of Events, which are a bare effect of Providence, and which affect thoſe who are the Owners of the things to which the loſs happens [m].

[m] Quod verò ſenectute contingit, vel morbo, vel vi latronum ereptum eſt, aut quid ſimile accidit: dicendum eſt nihil eorum eſſe imputandum ei, qui commodatum accepit, niſi aliqua culpa interveniat. *l.* 5. §. 4. *ff. commod. l.* 1. *C. eod. l.* 23. *in f. ff. de reg. jur.* Si commodavero tibi equum quo utereris uſque ad certum locum, ſi nulla culpa tua intervenerit in ipſo itinere deterior equus factus ſit, non teneris commodati: nam ego in culpa ero, qui in tam longum iter commodavi qui eum laborem ſuſtinere non potuit. *l. ult. ff. commod.* Tantùm eos caſus non præſtet, quibus reſiſti non poſſit quæ ſine dolo & culpa ejus accidunt. *l.* 18. *ff. commod. v. l.* 20. *eod.* Fortuitos caſus nullum humanum conſilium providere poteſt. *l.* 2. §. 7. *ff. de adm. rer. ad. civit. pert.* Ad eos qui ſervandum aliquid conducunt, aut utendum accipiunt, damnum injuria ab alio datum non pertinere, proculdubio eſt. Qua enim cura, aut diligentia conſequi poſſumus, ne aliquis damnum nobis injuria det? *l.* 19. *ff. commod.* See the ſixth Article of the ſecond Section of Proxies, and the twelfth Article of the fourth Section of Partnerſhip.

We may take notice upon this Article, of the diſtinction which is made by the Divine Law, between the caſe where the thing borrowed periſhes in the abſence of the Owner, and where it periſhes in his preſence. In this laſt caſe, the loſs falls upon the Owner, and in the firſt, on the Borrower. If a Man borrow ought of his Neighbour, and it be hurt, or die, the owner thereof being not with it, he ſhall ſurely make it good. But if the owner thereof be with it, he ſhall not make it good. *Exod.* xxii. 14, 15. *This diſtinction, is it grounded on this, that the Maſter being preſent, ſees that the Borrower is not any ways to blame for the loſs of the thing; and that if the Borrower were to be acquitted of the loſs which happens in the Owner's abſence, it would give occaſion to Borrowers to miſuſe, or neglect the things which they borrow, and even to pretend a loſs which had not happened?*

VII.

7. The regard which the Borrower ought to have to the thing borrowed, more than to his own.

If the thing borrowed periſhes by an accident, againſt which the Borrower might have guarded, by imploying his own thing, he ſhall be obliged to make it good. For he ought not to have uſed it, except for want of his own. And it would be the ſame thing, if in a Fire he had let the thing he borrowed periſh, that he might ſave his own [n].

[n] Proinde, & ſi incendio, vel ruina aliquid contingit, vel aliquid damnum fatale, non tenebitur, niſi fortè cùm poſſit res commodatas ſalvas facere, ſuas prætulit. *l.* 5. §. 4. *ff. commod.*

VIII.

8. The Borrower may take upon himſelf all Accidents.

If in view of ſome danger that was to be feared, it was agreed that the Borrower ſhould be accountable for all Accidents, he ſhall be bound to make good the Damage that happens thereby [o]. For it was in his power not to tie himſelf up to this condition, and it is he himſelf who has put the thing in danger.

[o] Cùm is qui à te commodari ſibi bovem poſtulabat, hoſtilis incurſionis contemplatione, periculum amiſſionis,

amiſſionis, ac fortunam futuri damni in ſe ſuſcepiſſe proponatur: præſes provinciæ —— placitum conventionis implere eum compellet. *l.* 1. C. *de commod.* Si quis pactus ſit ut ex cauſa depoſiti omne periculum præſtet, Pomponius ait pactionem valere: nec, quaſi contra juris formam, non eſſe ſervandum. *l.* 7. §. 15. *ff. de pact. l.* 5. §. 2. *ff. commod. vel. l.* 21. §. 1. *eod.* See the ſeventh Article of the third Section of a *Depoſitum*.

IX.

9. *Of the Thing lent and eſtimated.*

If the thing lent is eſtimated between the Lender and Borrower, in order to adjuſt what the Borrower ſhall reſtore; in caſe he do not reſtore the Thing it ſelf, he ſhall be accountable for this value, altho' the thing ſhould periſh by an accident [p]. For he who lends in this manner, does it that he may ſecure to himſelf in all events, the recovery either of the Thing which he lends, or of the Value, if the Thing periſhes.

[p] Si fortè res æſtimata data ſit, omne periculum præſtandum ab eo qui æſtimationem ſe præſaturum recepit. *l.* 5. §. 3. *ff. commod.* Æſtimatio periculum facit ejus qui ſuſcepit. Aut igitur ipſam rem debebit incorruptam reddere, aut æſtimationem de qua convenit. *l.* 1. §. 1. *ff. de æſtimat. act.*

X.

10. *If the Borrower puts the Thing to another uſe than that for which it was lent, he is accountable for accidents.*

If the thing lent periſhes by an accident, becauſe the Borrower put it to another uſe than that for which it was lent him, he ſhall be bound to make it good [q].

[q] Si cui ideò argentum commodaverim, quod is amicos ad cœnam invitaturum ſe diceret, & id peregrè ſecum portaverit, ſine ulla dubitatione etiam piratarum, & latronum, & naufragii caſum præſtare debet. *l.* 18. *ff. commod.*

XI.

11. *Penalty for miſuſing the Thing.*

If the Lender declares for what uſe he lends the Thing, and for what time, his intention ſhall ſerve as a Rule. And if nothing of this is mentioned, the Borrower cannot imploy the Thing, but in the natural and ordinary uſe for which it is proper, and during the time that is neceſſary for the occaſion for which it was lent. And if he puts it to any other uſe, contrary to the intention of the Lender, or againſt his Order, he commits a kind of Theft: and he ſhall be bound to make good the Loſſes, and Damages that happen thereupon [r].

[r] Si tibi equum commodavero ut ad villam adduceres, tu ad bellum duxeris, commodati tenebéris. *l.* 5. §. 7. *ff. commod.*

Qui alias re commodata utitur, non ſolum commodati, verum furti quoque tenetur. *d. l.* §. 8. §. 9. *inſt. de oblig. quæ ex del. naſc.* Qui jumenta ſibi commodata longius duxerit, alienave re, invito domino uſus ſit, furtum facit. *l.* 40. *ff. de furt.* Habet ſummam æquitatem, ut eatenus quiſque noſtro utatur, quatenus ei tribuere velimus. *l.* 15. *ff. de precar.* See the eighth and following Article of the firſt Section.

XII.

12. *If the Thing is damaged either by the uſe it is put to, or by the fault of the Borrower.*

If the Thing is damaged without any fault of the Borrower, and by the bare effect of the uſe which he had a right to put it to, he is not bound to make good the Damage; but if he is any way to blame for it, he ought to make it good [s].

[s] Eum qui rem commodatam accepit, ſi in eam rem uſus eſt in quam accepit, nihil præſtare, ſi eam in nulla parte, culpa ſua deteriorem fecit, verum eſt. Nam ſi culpa ejus fecit deteriorem, tenebitur. *l.* 10. *ff. commod.*

Sive commodata res ſive depoſita deterior ab eo qui acceperit, facta ſit, non ſolum iſtæ ſunt actiones, de quibus loquimur, verum etiam legis Aquiliæ. *l.* 18. §. 1. *eod.* Non videbitur reddita, quæ deterior facta redditur, niſi quod intereſt præſtetur. *l.* 3. §. 1. *eod.*

XIII.

13. *The Thing borrowed is not kept by way of Compenſation for a Debt.*

He who has borrowed a Thing, cannot keep it by way of Compenſation for what the Lender may be indebted to him [t].

[t] Prætextu debiti, reſtitutio commodati non probabiliter recuſatur. *l. ult. C. de commod.*

XIV.

14. *Expence laid out for the uſe of the Thing.*

If to make uſe of the Thing borrowed, it is neceſſary to be at ſome Expence, this falls to the ſhare of the Borrower [u].

[u] *See the fourth Article of the following Section.*

SECT. III.

Of the Engagements of the Lender.

The CONTENTS.

1. *He who has lent a thing cannot take it back till after the uſe.*
2. *How the thing may be taken back which is lent precariouſly.*
3. *Of the defects of the thing lent.*
4. *Expences laid out on the thing borrowed.*

I.

1. *He who has lent a Thing, cannot take it back till after the uſe.*

HE who has lent a Thing cannot take it back till it has ſerved the uſe for which it was lent. For it was free for him not to have lent it; but having lent it, he is obliged, not only in common Civility, but likewiſe by the effect of the Contract, to ſuffer the thing to be employed to that uſe; for otherwiſe the Loan, which ought to be a kindneſs, would prove an occaſion of cheating, and doing miſchief [a].

[a] Sicut

[a] Sicut voluntatis, & officii magis quam neceſſitatis eſt, commodare; ita modum commodati, finemque præſcribere, ejus eſt, qui beneficium tribuit. Cùm autem id fecit (id eſt poſtquam commodavit) tunc finem præſcribere, & retrongere, atque intempeſtive uſum commodatæ rei auferre, non officium tantùm impedit: ſed & ſuſcepta obligatio, inter dandum accipiendumque. Geritur enim negotium invicem, & ideo invicem propoſitæ ſunt actiones ut appareat quod principio beneficii, ac nudæ voluntatis fuerat, converti in mutuas præſtationes, actioneſque civiles. *l.* 17. §. 3. *ff. commod.* Adjuvari quippe nos, non decipi beneficio oportet. *d.* §. *in f.*

II.

2. How the Thing may be taken back, which is lent precariouſly.

In the Precarious Loan, the Lender may take back the Thing before the uſe for which it was lent is ſerved; for he did not lend it for a certain time; but on the contrary, on condition that he might take it back when he pleaſed [b]. However, this is not to be extended to an indiſcreet liberty of taking back the thing without any delay, and at an unſeaſonable time, which might occaſion damage to him who was uſing it; but ſuch a time ought to be allowed for reſtoring the thing, as appears to be reaſonable by the circumſtances [c].

[b] Qui precario concedit, ſic dat, quaſi tunc recepturus, cùm ſibi libuerit precarium ſolvere. *l.* 1. §. 2. *ff. de prec.* Utendum conceditur tamdiu, quamdiu is qui conceſſit patitur. *d. l.* 1.

[c] Ut moderatæ rationis temperamenta deſiderant. *l.* 10. §. 3. *ff. de quæſt.* In omnibus æquitas ſpectanda. *l.* 90. *ff. de reg. jur. l.* 183. *eod.*

III.

3. Of the defects of the Thing lent.

If the Thing lent has any defect which may be of prejudice to the Borrower, and if this defect was known to the Lender, he ſhall be accountable for any damage that ſhall happen thereby to the Borrower. As if to hold Wine, or Oil, he has lent Veſſels which he knew to be ſpoiled; if to prop up a Building, he has lent Timber which he knew to be rotten. For we lend to do ſervice, and not to do miſchief [d].

[d] Qui ſciens vaſa vitioſa commodavit, ſi ibi infuſum vinum, vel oleum corruptum effuſumve eſt, condemnandus eo nomine eſt. *l.* 18. §. 3. *ff. commod.*

Idemque eſt ſi ad fulciendam inſulam, tigna commodaſti——ſciens vitioſa——adjuvari quippe nos, non decipi beneficio oportet. *l.* 17. §. 3. *in fine eod.*

See the eighth Article of the third Section of Letting and Hiring.

IV.

4. Expences laid out on the Thing borrowed.

The Expences which are neceſſary in order to make uſe of the thing borrowed, ſuch as the feeding and ſhoeing a Horſe that is lent, are due by the Borrower. But if there happen any other charges, ſuch as for curing a Horſe of ſome hurt which he received without any fault of the Borrower, the Lender ſhall be bound to pay ſuch Expences as theſe, unleſs they are ſo very inconſiderable, that the benefit which the Borrower reaps from the uſe of the thing lent ſhould oblige him to defray them [e].

[e] Poſſunt juſtæ cauſæ intervenire ex quibus cum eo, qui commodaſſet, agi deberet. Veluti de impenſis in valetudinem ſervi factis, quæve poſt fugam requirendi, reducendique ejus cauſa factæ eſſent. Nam cibariorum impenſæ, naturali ſcilicet ratione ad eum pertinent qui utendum accepiſſet. Sed & id, quod de impenſis valetudinis, aut fugæ diximus, ad majores impenſas pertinere debet. Modica enim impendia verius eſt, ut ſicuti cibariorum, ad eundem pertineant. *l.* 18. §. 2. *ff. commod. l.* 8. *ff. de pign. act.*

TITLE VI.

Of the Loan of MONEY, and other Things to be reſtored in Kind; and of USURY.

The Origin of the Loan of Things which may be reſtored in kind.

WE have ſeen in the foregoing Title, the manner in which Men lend to others *gratis* thoſe Things whoſe Nature is ſuch, that after they have been uſed, they are capable of being reſtored, as we return a Horſe to the perſon of whom we borrowed him.

But there is another ſort of Things, whoſe Nature is ſuch, that after we have made uſe of them, it is not poſſible to reſtore them. For we cannot uſe them without conſuming them, or putting them out of our poſſeſſion. Of this kind is Money, Grain, Liquors, and other things of the like nature. So that to lend them, another kind of Covenant is neceſſary; and this is the Loan which we ſhall diſcourſe of under this Title.

Two characters of Things which are lent.

To underſtand aright the nature of this Loan, it is neceſſary to conſider in this kind of Things two Characters, which diſtinguiſh them from all others; and which are the Foundation of ſome diſtinctions that are neceſſary to be obſerved between this Loan, and the other Contracts of which we have ſpoke.

The firſt of theſe Characters is, that we cannot uſe Money, Corn, Liquors, and other things of the like nature, but by ceaſing to have them: And this is a natural effect of the Providence of God, who deſigning Man for Labour, has made theſe kinds of Things ſo neceſſary to him, and has made them of ſuch a

nature, that they cannot be had but by Labour, and that we ceaſe to have them as ſoon as we uſe them; to the end that this Want, which always returns, may oblige Man to a Labour which laſts as long as his Life.

The ſecond Character which diſtinguiſhes theſe Things from all others, is that whereas in other Things it is very hard to find many of the ſame kind which are perfectly like to one another, and which have the ſame Value, and the ſame Qualities, we may eaſily in Things of this kind find many that are exactly the ſame both in Value, and in Quality. Thus, all Piſtoles, all Crowns, and all other Pieces of Money have the ſame Allay, the ſame Weight, the ſame Stamp, the ſame Value: and every one of them ſerves inſtead of all others of the ſame kind: and we may likewiſe make up the ſame Sum, in other Species of Coin. Thus we have Grain for Grain, Liquors for Liquors, of the ſame Quality, and of the ſame Meaſure, or of the ſame Weight.

The nature of this kind of Loan, and the Characters which diſtinguiſh it from the Loan of Things to be reſtored in Specie, and from other Contracts.

Theſe two Characters of the Things of this kind, are the Foundations of the Commerce which is made of them by this ſort of Loan. For ſince we cannot have the uſe of them, and reſtore the ſame things, as we might have of a Suit of Hangings, a Horſe, or a Book; we borrow them on condition to reſtore as much of the ſame kind: which is eaſy to be performed, ſince it depends wholly on counting, weighing, or meaſuring: and this is the Covenant which we diſtinguiſh by the name of a Loan of Things to be reſtored in kind.

Thus we ſee that in our Language the word Loan is common to the Loan of Money, and to the Loan of a Horſe: and that altho' they are two ſorts of Covenants, whoſe Natures are different, and which have alſo in the *Latin* Tongue different Names, yet we give indifferently to the one and the other the Name only of Loan; becauſe both ſorts have this in common, that the one lends to the other on condition to have the ſame Thing reſtored to him, if it be ſuch as that the uſe of it does not conſume it, or to receive another Thing exactly like to what was lent, and which may ſerve inſtead of it, if the Thing lent was ſuch that it could not be uſed, without being conſumed, or given away. But ſince, as has been remarked in the foregoing Title, we muſt not confound theſe two kinds of Covenants together, we have therefore thought proper to diſtinguiſh them by different Names.

It appears from this uſe of the Loan which ſhall be the ſubject matter of this Title, what the Nature of it is, and that it is a Contract in which the Lender gives a Thing, on condition that the Borrower ſhall reſtore to him, not the ſame Thing in ſubſtance, but as much of the ſame kind. So that it is eſſential to this Contract, that the Thing lent ſhould paſs in ſuch a manner to the Borrower, as that he may become Maſter of it, in order to have a right to conſume it. And it is from this uſe of this kind of Loan, that we may diſcern what it has in common with Sale, with Exchange, with the Loan of Things to be reſtored in Specie, and with Letting and Hiring; and what it is that diſtinguiſhes it from theſe other kinds of Covenants.

It is common to Sale, and to the Loan of Things to be reſtored in kind, that the thing is alienated; but in a Sale, it is alienated for a Price; and in a Loan, it is given on condition to receive exactly ſuch another.

It is common to Exchange, and to this kind of Loan, that one Thing is given for another; but in Exchange, it is in the difference of the Things that the Contracters find their conveniency, giving ſome different thing to one another reciprocally, and at the ſame time: whereas in a Loan, one gives on condition to have ſomething again, not immediately, but ſometime after, and not a different Thing, but a Thing exactly like to that which was lent.

It is common to the Loan of Things to be reſtored in Specie, and to the Loan of Things to be reſtored in Kind, that a Thing is lent *gratis*[a]; but in the Loan of Things to be reſtored in Specie, the Borrower is only to uſe the Thing, and to reſtore it after he has done with it; and in the Loan of Things to be reſtored in Kind, the Borrower is allowed to conſume the Thing, and to give to the Lender another of the ſame kind and value.

[a] *It is the nature of a Loan to be free and gratuitous: and this Truth which is here preſuppoſed, ſhall be proved hereafter.*

It is common to the Contract of Letting and Hiring, and to Loan, that a Thing is given to be uſed. But in Letting and Hiring, the uſe of the thing is granted for a Hire, and on condition that the ſame Thing be reſtored: whereas in this kind of Loan, the uſe of the Thing is granted without any other Charge than that of reſtoring as much of the ſame kind.

It

It is common to theſe five ſorts of Covenants, that the Parties covenanting do there treat of the Things, only with a view to the Uſe which may be made of them; but they treat about this Uſe of the Things in a very different manner. One way, which is proper to the Loan of Things to be reſtored in Specie, and to Letting and Hiring, is where the Contracters treat only of the bare Uſe, and not of the Property of the Things; for in theſe Contracts there is no Alienation of the Thing: The other way which is peculiar to Sale, to Exchange, and to the Loan of Things to be reſtored in Kind, is where the Parties treat only of the bare Property of the Things, and where they are alienated without any regard to the Uſe which ſhall be made of them, and in ſuch a manner, that altho' the Thing ſhould periſh as ſoon as the Contract is accompliſhed, and before it were poſſible for him who receives the Thing to make any uſe of it; yet the Contract would remain entire: Whereas the Loan of Things that are to be reſtored in Specie, and the Contract of Letting and Hiring do not ſubſiſt, if the Thing periſhes before he who receives it has been able to uſe it: and the Contract vaniſhes, if the Thing periſh. From whence it follows, that he who has taken a Thing by Sale, by Exchange, or by a Loan, which obliges him to reſtore it in Kind, is become Proprietor of the Thing; and that when he uſes it, it is his own Thing that he uſes. But in the Loan of Things to be reſtored in Specie, and in Letting and Hiring, it is another Man's thing that is uſed by the Borrower, and by the Hirer.

Uſe of the Remarks which have been made.

We have made here all theſe Remarks on the different Natures of the Things which are lent, either by a Loan which obliges to make Reſtitution in Specie, or by a Loan which obliges to a Reſtitution in Kind; upon the Characters that are common to Loan, and to other kinds of Covenants; and upon thoſe which diſtinguiſh them, in order to lay the Foundations of the Rules of Loan, which ſhall be explained in this Title.

And theſe Remarks will likewiſe ſerve, together with others that ſhall be made hereafter, to diſcover what are the cauſes which render it unlawful to take Intereſt for Money lent, and why this Intereſt, which is otherwiſe called Uſury, and which was ſuffered by the *Roman* Law, is ſo little countenanced with us, that our Laws puniſh Uſury as a very great Crime. We give the name of Uſury, to every thing that the Creditor who has lent either Money, or Proviſions, or other Things which are conſumed by Uſe, may receive over and above the value of the Money, or other Thing which he lent.

Of Uſury, and the cauſes which render it naturally unlawful.

Although this matter of Uſury being otherwiſe regulated by our Laws, than by the *Roman* Law, be without the bounds of the deſign of this Work; yet ſeeing it is an eſſential part of this kind of Loan we are now treating of, and that the knowledge of it is of moſt frequent and neceſſary uſe, and that it hath its Principles in the Law of Nature, we thought it not proper to omit it in this Title of Loan. But to keep to the method which we propoſed, not to inſert in the detail of the Rules any others than ſuch as are both agreeable to the *Roman* Law, and to our Uſage, we ſhall blend what relates to Uſury, with the particular Rules of Loan; and we ſhall mention here at the head of this Title, all that we ſhall think fit to ſay on this ſubject.

To eſtabliſh the Principles upon which we are to judge, whether the Intereſt of Money lent be lawful, or not, we need only have recourſe to the Authority of the Divine Law, which has condemned it, and forbid it in ſuch ſtrong and expreſs terms. For whoever has common ſenſe, cannot but agree that that is to be accounted unjuſt and unlawful which God condemns and prohibits[b]. But although it be his Will alone which is the Rule of Juſtice, or rather which is Juſtice it ſelf, and which renders juſt and holy whatever he commands[c]; yet he ſuffers, and even requires that Man ſhould conſider and examine what that Juſtice is, and that he ſhould open his eyes to the Light of it, in order to know it[d]. If therefore we would diſcover what is the character of the Iniquity, which renders Uſury ſo criminal before God, and which ought to make it ſo to us both in our hearts and minds; we have only to conſider what the Nature of this Contract of Loan is, in order to judge whether it be juſt to take Intereſt for it or not. And we ſhall eaſily perceive by the Natural Principles of the Uſe which God has given to this Contract in the Society of Men, that Uſury is a Crime which violates theſe Principles, and undermines the very Foundations of the Order of Society.

[b] A Man of Underſtanding truſteth in the Law. *Eccluſ.* xxxiii. 3.

[c] The Judgments of the Lord are true, and righteous altogether. *Pſal.* xix. 9.

[d] Learn Juſtice, and the Judgments of God. *Eccluſ.* xvii. 24.

The two ways of Lending, whether it be that of the Loan of Things to be reſtored in Specie, which has been treated of under the foregoing Title, or the Loan of Things to be reſtored in Kind, which is the ſubject of this Title, derive their Origin, as all the other Covenants, from the Order of Society; and they are natural and eſſential to it. For it is eſſential to this Order, where Men are linked together by mutual Love, and where every one has for a Rule of the Love which he owes to his Neighbour, that which he has for himſelf, that there ſhould be ways whereby Men may aſſiſt one another gratuitouſly, both with Things, and with their Perſons. And as there are Covenants eſtabliſhed for ſuch Commerces between them as are not gratuitous, ſo there ought alſo to be for ſuch as are. Thus, ſeeing Men may traffick with one another about the Property and Uſe of Things; there are therefore Covenants eſtabliſhed for the ſaid Traffick; ſuch as Sale, Exchange, and Letting and Hiring: Which makes it to be of the Nature of theſe Covenants, not to be free and gratuitous. Thus, ſeeing Men may communicate to one another freely, and without any reward, both the Property and Uſe of Things, there are therefore Covenants, by which they may acquire Things in this manner, the nature of which is for this reaſon, that they ſhould be gratuitous, ſuch as Donation, and the Loan of Things to be reſtored in Specie [e].

[e] Gratuitum debet eſſe commodatum. §. 2. *inſt. quibus mod. re contr. obl.*

It is therefore certain, that there are two ways by which people may communicate to one another the Uſe of Things. One is gratuitous, and the other for a recompence, in ſuch things where this Commerce may be lawful. Thus, the Owner of a Horſe may either let him out for a Hire, or the price of the Service which the ſaid Horſe may render; or he may lend the uſe of him gratuitouſly, and without any reward. And theſe two ſorts of Covenants have their Nature and Characters different, which ought not to be confounded together.

It remains therefore, in order to know whether we may take Intereſt for the Loan of Money, or not, that we examine, whether as there are two ways of giving the uſe of a Horſe, of a Houſe, a Suit of Hangings, and other things of the like nature, one by the Loan of Things to be reſtored in Specie, and without any recompence, and the other by Letting it to Hire for a certain price, and both the one and the other honeſt and lawful, there be likewiſe two ways of giving Money, Corn, Liquors, and the other things of the like kind; one by a free gratuitous Loan, and the other by Letting them out for Hire, or a gainful Loan. So that as it is indifferently juſt and natural, that he who gives his Horſe, ſhould have his choice of ſaying that he either lends it, or that he lets it out, it may be likewiſe equally natural and juſt for him who gives his Money, his Corn, his Oil, his Wine, to have it in his choice to ſay, that he lends it out upon Intereſt, or without Intereſt.

This is without doubt the point in queſtion, which depends on the knowledge of the Cauſes which juſtify the will of him, who inſtead of lending his Horſe, will only let him out for a certain profit; and on the enquiry whether there be alſo cauſes which juſtify the will of him who will not lend his Money, or his Proviſions, but on condition that he ſhall have Intereſt for them. And in order to judge of this Parallel, we muſt conſider what it is that paſſes in the Contract of Letting and Hiring, and likewiſe ſee what paſſes in the Loan of Money, or Proviſions.

In the hiring of a Horſe, a Houſe, and other things, he who lets it out may juſtly ſtipulate the price of the ſervice and uſe which he who hires the thing may reap from it, whilſt he who is the Owner of it ceaſes to enjoy it, and to make uſe of it: and he likewiſe has for a Title to juſtify him in ſo doing, that ſort of diminution, which, although it be inſenſible, does nevertheleſs happen to the thing that is hired.

In the Leaſe of a Farm, the Leſſor juſtly ſtipulates the price of the Fruits and other Revenues which may ariſe from the Lands that are farmed out.

In Undertakings of Work to be done, and in the Hire of Labourers, it is but juſt that thoſe who give their time and their pains, ſhould ſecure to themſelves a Salary for the Labour out of which Men are to get their livelihood.

We ſee then, in all theſe ſorts of Commerce, that that which renders lawful the Profit, or the Revenue, that may

be made by them, is, that he who lets out to another, either his Labour, or his Induſtry, or a Horſe, a Houſe, a Farm, or other Thing, ſtipulates juſtly a Price for the Right which he gives another to enjoy either the Produce of his Labour, or the Service of his Horſe, to dwell in his Houſe, to reap the Fruits of his Lands, or to have the benefit of the other uſes that may be made of the Thing that is let out to Hire. But altho' this Agreement ſeems to be a juſt Title for taking a Salary, a Hire, or other Revenue; yet it would not be ſufficient to juſtify the profit that is made by letting to Hire, if it were not attended with the other Characters that are eſſential to this Contract, and which are ſuch, that if they were wanting, the Covenant, for the profit to be made thereby, would be unjuſt. So that altho' it were true, that one might make ſuch a Stipulation for the Intereſt of Money, or Proviſions, in conſideration of the advantage which the Borrower might make of them, which cannot be, as ſhall be ſhewn hereafter; yet the want of theſe other Characters which are neceſſary to juſtify the profit that is made by Letting and Hiring, would render the Intereſt of Money unlawful. And in order to judge of it, we are only to conſider what thoſe Characters are, which are to be found in Letting and Hiring, and not in a Loan, and without which even the profit that is made by Letting to Hire, would be unlawful.

In Letting and Hiring, it is neceſſary that he who hires the Thing, ſhould be at liberty to make uſe of it, and enjoy it according to the quality of the Agreement, and if he were hindred from doing ſo by an Accident, he would be diſcharged from the Rent, or Hire. But in a Loan, the Borrower remains bound, whether he uſes the thing that he has borrowed, or that he is hindred by ſome accident from uſing it.

In Letting and Hiring, the perſon who hires the Thing is obliged only to reſtore the ſame thing which he has hired, and if it periſhes in his Hands, by any Accident, he is not anſwerable for it, and is not obliged to reſtore any thing.

But in a Loan of this kind, the Borrower is obliged to reſtore the ſame Sum, or the ſame Quantity, which he had borrowed, altho' he ſhould at the ſame time loſe it by an Accident.

In Letting and Hiring, the diminution, be it ſenſible or inſenſible, which happens to the Thing that is let, by the uſe which is made of it by the perſon who has hired it, falls upon the Owner, who had let it out.

But in a Loan of this kind, the Lender ſuffers no diminution, nor bears any loſs.

In Letting and Hiring, the Leſſee uſes that which belongs to another, for he who lets a Thing remains Maſter of it: and if he were not, he would have no right to take a Rent, or Hire, for the uſe of it.

But in this kind of Loan, the Borrower becomes Maſter of the thing that is lent him; and if he were not, he could not uſe it. So that when he makes uſe of it, it is his own thing that he uſes; and the Lender has no longer any right to it.

We ſee by this parallel of the Characters which diſtinguiſh the Contract of Letting and Hiring from that of Loan, what are in the Contract of Letting and Hiring the natural Cauſes which juſtify the profit which he makes who lets out his Labour, his Lands, or any other thing; and that to render the Rent, or Hire thereof lawful, it is neceſſary, that he who lets out a thing, ſhould retain the Property of it, and that he remaining Maſter of the thing, ſhould bear the loſs or diminution of it, if it periſhes, or is diminiſhed. And he muſt moreover warrant the Enjoyment and Uſe of the Thing to him who hires it, and if this Enjoyment ſhould be interrupted, and ceaſe, even altho' it were by an Accident, he could not demand the Rent, or Hire. Which makes the condition of the Leſſee ſuch, that he is ſure of enjoying the Thing of another perſon, without being in danger of paying any thing for it if he does not enjoy it, and without the hazard of loſing the Thing, if it periſhes.

Theſe are the natural Foundations which render theſe ſorts of Commerce lawful, where one puts a Thing into the hands of another perſon, for ſome gain or profit that accrues to both. And we ſee on the contrary, that he who lends Money, or Proviſions, upon Intereſt, does not aſcertain any profit to the Borrower; and yet nevertheleſs ſecures to himſelf a certain gain. That he does not ſo much as warrant the uſe of the Thing which he gives, and that on the contrary, although the Thing which he lends ſhould happen to periſh, the Borrower ſhall nevertheleſs be bound to reſtore to him as much, and likewiſe the Intereſt. So that he takes a ſure profit, where the Borrower can have only loſs: That he takes profit of a thing

thing that is not his own; and even of a thing which in its own nature yields no profit; but which can only be put to uſe by the induſtry of the Borrower, and with the hazard both of the whole Profit and Capital, without the Lender's contributing any ſhare, either of the ſaid Induſtry, or of the Loſs.

We ſhall not enlarge any further on the conſequences which follow from all theſe Principles: and what has been ſaid, is ſufficient to convince us, that Uſury is not only unjuſt becauſe of its being prohibited by the Law of God, and becauſe of its being contrary to Charity, but that it is moreover naturally unlawful, as being a violation of the moſt juſt and moſt certain Principles of the Nature of Covenants, and which are the Foundation of the Juſtice of the Profits that are made by all theſe ſorts of Commerce. So that it is not ſtrange that Uſury ſhould be looked on as ſo odious and ſo criminal a practice, and that it ſhould be ſo rigorouſly condemned, both by divine and humane Laws, and ſo ſeverely repreſſed, both by our Religion, and Civil Policy.

It would not be neceſſary, after theſe proofs of the iniquity of Uſury, to anſwer the Objections that are brought by Uſurers, ſeeing it cannot be doubted that an unlawful Commerce cannot be tolerated on any pretext whatſoever. And beſides, the Law allows of none, and condemns all Uſury without diſtinction, and without having any regard to all the motives that are made uſe of to juſtify it, and to excuſe it. But becauſe the pretexts for Uſury, however unjuſt they may be, have this effect, that thoſe who make uſe of them, pretend that the general Rule prohibiting Uſury admits of the Exceptions which they would make to it, it is neceſſary to ſhew, by the Anſwers to theſe Objections, and to theſe pretexts, that this Rule admits of no Exception whatſoever.

Firſt pretext of Uſurers, that they do a kindneſs.

All the pretexts of Uſurers center in this, To ſay that they do a kindneſs; that they deprive themſelves of the gain which they might make of their Money, or other things which they may lend; and even that the Loan occaſions them loſs. And in fine, that the Borrower makes profit by it, or reaps ſome other advantage from it.

Anſwer.

It is true, that to lend, is to do a kindneſs, and this is the natural and eſſential character of the Contract of Loan. But it is for this very reaſon, that we can lend only gratuitouſly, in the ſame manner as we can only make a Gift, or beſtow Alms, without any recompence. And it would be very ſtrange, that by means of a Contract, the eſſential uſe of which is to do a kindneſs, we ſhould make Merchandize of that very kindneſs. As therefore it would be againſt all Order, for him who makes a free Gift, or beſtows Alms, to ſell that Favour which he does by giving; and that it would not be any longer either a Gift, or an Alms; it is likewiſe contrary to Order, that he who lends ſhould ſell his kindneſs. For in a word, it is ſo eſſential to all manner of Kindneſs that it ſhould be gratuitous, that even in the Covenants where one may lawfully receive a profit for doing a Kindneſs, it cannot be the Kindneſs it ſelf which is turned into Commerce. But every Profit has ſome other cauſe. Thus, he who lets his Houſe to one who cannot find another, does him a kindneſs: but he ſhall not for this reaſon be at liberty to take from this Tenant, whom he is willing to oblige, a greater Rent than he would take from one whom he did no ways intend to oblige by letting it: Otherwiſe it might be ſaid, that we may ſell dearer to a Friend than to a Stranger, ſeeing we ſhould ſell to him with the circumſtance of having a mind to oblige him, which we ſhould not have in our thoughts, if we ſold to a Stranger.

We cannot therefore make uſe of the pretext of doing a pleaſure to excuſe Uſury, but as a blind, and with intention to overthrow the Order of the firſt Laws, which enjoin us to do good, only becauſe they require us to love; and which do not ſuffer us to ſell that Love which they command every one to have in his heart towards his Neighbour.

This Truth, that a Kindneſs cannot be bought and ſold, is ſo natural, that by the *Roman* Law, which allowed of Uſury, as ſhall be ſhewn hereafter, a Debtor could not even compenſate with the Intereſt which he owed, a good Office done to his Creditor. And we have a remarkable Inſtance of it in one of the Laws of the *Pandects* [f], where it is ſaid, That if one who is indebted in a Sum of Money, which of its own nature produces no Intereſt, undertakes the management of the Affairs of his Creditor, in his abſence, and without his knowledge, he is obliged to pay the Intereſt of that Sum, after the term of payment is expired, without any demand. And the good Office

which

which he renders is ſo far from being reckoned a Compenſation for that Intereſt, that it is laid down as a Rule in that Law, That every good Office which the Debtor renders to his Creditor, in taking care of his Affairs, obliges him to demand that Intereſt of himſelf, and to pay it, without retaining it as a Compenſation for the kindneſs he does him; becauſe, as is mentioned in the ſame Law, in relation to another kind of duty, thoſe who do any Office, or Service, which in its nature ought to be free and gratuitous, ought to do it intirely, and without intereſt, and can take nothing for it[g]. And we ſee likewiſe in the *Roman* Authors, who were no more enlightned with the Spirit of the Divine Law, than thoſe Authors were from which the Laws of the *Pandects* have been taken, that they were of Opinion, that it was eſſential to the nature of an Act of Kindneſs, not to put it out to Uſury[h].

[g] *L.* 38. *ff. de neg. geſt.*

[g] Cum gratuitam, certè integram, & abſtinentem omni lucro, præſtare fidem deberent. *d. l.* 38. *ff. de neg. geſt.*

[h] Benefici, liberaleſque ſumus non ut exigamus gratiam: neque enim beneficium fœneramur. *Cic. de amicitia.* Fœneratum iſthuc hoc beneficium tibi, pulchrè dices. *Terent. in Phormione.*

Second and third Pretext, Loſs, or Want of Gain.

All the conſequence then which the Creditor, who lends his Money with this view, can draw from this good intention of his to do a kindneſs, is, that he ought to lend it *gratis*; and if the Loan is not agreeable to him with this condition, which is inſeparable from it, he has nothing to do but to keep his Money, or put it to ſome other uſe. And he will not have reaſon to complain, neither that the Loan deprives him of a Gain, nor that it occaſions him any Loſs. *Anſwer.* And this may ſerve as an anſwer to the objection, made by thoſe who ſay, that by lending they ceaſe to gain, or that they even loſe, ſeeing they are at liberty not to lend; ſeeing the Contract of Loan was not invented for the benefit of thoſe who lend, but for the conveniency of thoſe who borrow; and in fine, that people may lay out their Money in purchaſing Annuities, or employ it ſome other way, beſides that of lending it on Intereſt; which can never become innocent under any pretext whatſoever, ſeeing there is none but what God has foreſeen, and which his expreſs prohibition of Uſury ſhews to be unwarrantable. Thus, we ſee that both the Church, and the State, have prohibited Uſury by ſo many Laws, not as a bare Injuſtice, but as a great Crime. For the Councils, and the Canons, do ſo ſeverely repreſs Uſury, that they condemn even as Hereticks, thoſe who ſtand up in defence of it[i], becauſe that in effect it is an error againſt the Spirit and firſt Principles of the Law of God. And the Ordinances puniſh it ſo rigorouſly, that the Puniſhment of Uſury in *France*, for the firſt time, is a publick acknowledgment of the Offence, in an ignominious manner; which in *France* is called, *L'Amande Honorable*, and Baniſhment moreover. And the ſecond Offence is Death[k]. And by that Law the Uſurer is to be hanged, altho' he ſhould alledge in his defence, that by lending his Money he ceaſed to gain, or that even he ſuſtained ſome loſs or damage thereby.

[i] *Can.* 1, 4, 5. *D.* 47. *toto tit. de uſur. Clem. de uſur.*

[k] *Ordinance of* Blois, *Art.* 202.

Fourth Pretext, The Profit of the Borrower.

The pretext of the profit which the Borrower may make of the Money which he borrows, is of no greater conſideration in the eye of the Law, than the other pretexts before mentioned; and it likewiſe is nothing elſe but an illuſion. *Anſwer.* Seeing this Profit, if any were to be made by the Borrower, could not be a ſufficient Title to juſtify the Lender's taking Intereſt. For it is the Rule touching future Profits, that to be intitled to a ſhare of them, one ought to run a hazard of the Loſſes which may happen, inſtead of the Profits which were hoped for. And the condition of being intitled to a ſhare of a future Gain, implies that of not profiting, unleſs there be Gain made, and even of loſing, in caſe any Loſs does happen[m]. One cannot therefore, without breach of Humanity, nor even without a Crime, diſcharge himſelf from the Loſs, and aſcertain to himſelf a Gain. To which we muſt add what has been ſaid touching the cauſes which juſtify the taking of Profit.

[m] Secundum naturam eſt commoda cujuſque rei eum ſequi, quem ſequuntur incommoda. *l.* 10. *ff. de reg. jur.* See the inſtance given in *l. ult.* §. 3. *Cod. de furt.* and of *l.* 13. §. 1. *ff. commod.*

Iniquity of Uſury.

There remains then no other Title for the juſtification of Uſury, beſides the Covetouſneſs of the Lender, and the Neceſſity of the Borrower. And it is likewiſe the combination of theſe two different kinds of Evils, which has been the occaſion, and the ſource of the Commerce of Uſurers. So that where-

as the Divine Providence forms the conjuncture which brings the perſon who is in want, near to him who is able to relieve him, that the ſight of the Neceſſity of the one, may diſpoſe the other to exerciſe his Charity, or Humanity[n]; the Uſurer makes of this Conjuncture a Snare; according to the Scripture Phraſe, he lies in wait, to make a prey of thoſe who fall into it[o].

[n] The rich and poor meet together: the Lord is the maker of them all. *Prov.* xxii. 2.

The poor and the deceitful man meet together: the Lord lighteneth both their eyes. *Prov.* xxix. 13. And he gave every man commandment concerning his neighbour. *Eccluſ.* xvii. 14.

[o] His eyes are privily ſet againſt the poor. He lieth in wait ſecretly, as a Lion in his den; he lieth in wait to catch the poor: he doth catch the poor when he draweth him into his net. *Pſal.* x. 8, 9.

Bad conſequences of Uſury.

We ſhall not dwell upon the other characters of the Iniquity that is to be found in Uſury, ſuch as Idleneſs[p], which it leads the Uſurer into, by reaſon of the facility of making Profit, without Induſtry, without Hazard, and without Trouble; the liberty which the Lender has to take his Intereſt immediately, and to demand his Principal whenever he pleaſes; and the ſlavery[q] into which Uſury brings the Debtor, under the burden of paying always to no purpoſe; and of ſeeing himſelf expoſed every moment to repay the whole at an unſeaſonable time, which may prove his ruine. Neither ſhall we enlarge any farther on the detail of the Inconveniencies of Uſury in Trade, and the Troubles and other Evils which it occaſions to the Publick. They are ſufficiently known by experience; and it is eaſie to imagine, that a crime which extinguiſhes the Spirit of the firſt Laws, and which by that means deſtroys the very Foundations of Society, raiſes Troubles and Diſorders in it; and Troubles of ſuch dangerous conſequence, that we know that at *Rome* Uſury was the occaſion of many Seditions[r]; and it is upon this account that our Laws have extended the puniſhment of Uſurers even to death.

[p] Vivant omnes Judæi de laboribus manuum ſuarum, vel negotiationibus ſine terminis, vel uſuris. *St. Lewis*, 1254. In omnibus ferè locis, ita crimen uſurarum invaluit, ut *(aliis negotiis prætermiſſis)* quaſi licitè uſuras exerceant. *Cod. l. 3. de uſur.*

[q] The borrower is ſervant to the lender. *Prov.* xxii. 7.

[r] Sanè vetus urbi fœnebre malum: & ſeditionum, diſcordiarumque creberrima cauſa. *Tacit. 6. annal. Anno Urbis* 786.

Prohibitions of Uſury in the Law, and the Prophets.

These ſeveral Evils which are occaſioned by Uſury, and the characters of Iniquity which are diſcovered in it by the Principles of the Law of Nature, are juſt cauſes of the Prohibition of it by the Law of God[s]. And we cannot doubt of Uſury's being a great Crime, when the Prophets call it an Abomination, and place it in the rank with Idolatry, Adultery, and other great Crimes[t]. Which plainly ſhews, that Uſury is contrary to the Spirit of the Law of Nature. For if there were no greater difference between lending one's Money without Intereſt, or upon Intereſt, than there is between lending a Horſe, and letting him to hire, it would be impious and abſurd to imagine, that the Law of God, which does not forbid the taking Hire for a thing that is let out, ſhould have forbid the taking Intereſt for Money lent, and ſhould have placed it in the number of the moſt enormous crimes. So that it muſt neceſſarily be, that the Law of Nature, which is not tranſgreſſed by Letting and Hiring, be ſo by Uſury: and it is ſo in reality all the ſeveral ways that have been mentioned, and which render Uſury ſo contrary to Humanity, and give it a character of Iniquity ſo naturally ſenſible, that it has made it odious even to thoſe Nations which were ignorant of the firſt Laws[u]. For it was prohibited at *Rome* in the firſt Ages of the Commonwealth, and long before the Goſpel was known there; and it was even more rigorouſly prohibited than Theft. Since whereas the Puniſhment of Theft was only the double of the thing ſtollen, that of Uſury was the quadruple[x]. Thus Uſury was looked upon among the *Romans* as a very pernicious crime; and thus we likewiſe ſee that an eminent *Roman*, being one day aſked what he thought of Uſury, made no other anſwer to the perſon who aſked him the queſtion, than by aſking him again what he thought of Murder[y]. And the Author who has taken notice of this anſwer, has ſaid in another place, that Uſury kills[z]. We know likewiſe that another Author of greater antiquity, in raillery, makes one who wanted Money to ſay, that if he could not get any to borrow, he would take ſome upon Intereſt; to ſhew that it is contrary to the nature of Loan to take Intereſt for it[a].

Uſury forbidden at Rome.

[s] And if thy brother be waxen poor, and fallen in decay with thee; then thou ſhalt relieve him: yea, though he be a ſtranger, or a ſojourner, that he may live with thee. Take thou no uſury of him, or increaſe; but fear thy God, that thy brother may live with thee. Thou ſhalt not give him thy money upon uſury, nor lend him thy victuals for increaſe. *Lev.* xxv. 35, 36, 37. Thou ſhalt not lend

lend upon uſury to thy brother; uſury of money, uſury of victuals, uſury of any thing that is lent upon uſury. Unto a ſtranger thou mayeſt lend upon uſury, but unto thy brother thou ſhalt not lend upon uſury, *Deut.* xxiii. 19, 20. I rebuked the Nobles, and Governors, and ſaid unto them, do ye all of you take uſury from your brethren. 2 *Eſdr.* v. 7.

[t] Lord, who ſhall dwell in thy tabernacle, or who ſhall reſt upon thy holy hill? —— He that hath not given his money upon uſury. *Pſal.* xv. 1, 6. He that hath not given forth upon uſury, neither hath taken any increaſe.——He is juſt, he ſhall ſurely live, ſaith the Lord God. *Ezek.* xviii. 8, 9. Hath eaten upon the mountains, and defiled his neighbour's wife; Hath oppreſſed the poor and needy, hath ſpoiled by violence, hath not reſtored the pledge, and hath lift up his eyes to the idols, hath committed abomination. *Hath given forth upon uſury, and hath taken increaſe*; ſhall he then live? he ſhall not live; he hath done all theſe abominations, he ſhall ſurely die, his blood ſhall be upon him. *Ezeck.* xviii. 11, 12, 13. That hath not received uſury nor increaſe. *Ibid.* v. 17. Thou haſt taken uſury and increaſe. *Ibid.* xxii. 12.

[u] Primum improbantur hi quæſtus, qui in odia hominum incurrunt, ut fœneratorum. *Cic. lib.* 1. *de offic.*

[x] Majores noſtri ſic habuerunt, & ita legibus poſuerunt. Furem dupli condemnari, fœneratorem quadrupli. *Marc. Cato de re ruſt.* Sanè vetus urbi fœnebre malum, & ſeditionum diſcordiarumque creberrima cauſa; eoque cohibebatur antiquis quoque, & minùs corruptis moribus. Nam primo duodecim tabulis ſanctum, ne quis unxiariò fœnore amplius exerceret, cùm antea, ex libidine locupletum agitaretur. Dein rogatione tribunitia ad ſemuncias redacta: poſtremò vetita uſura. Multiſque plebiſcitis obviam itum fraudibus, quæ toties repreſſæ, miras per artes rurſum oriebantur. *Tacitus 6. annalium, anno urbis 786.*

[y] Cùm ille qui quæſiſſet, dixiſſet, quid fœnerari? tum Cato: quid hominem, inquit, occidere? *Cic. lib.* 2. *de off. in fine.*

[z] Ne fœnore trucidetur. *Cic. pro Cœlio.*

[a] Si mutuò non potero, certum eſt ſumam fœnore. *Plaut. in aſinaria.*

Objection from the liberty granted to the Jews, *to lend upon Uſury to other nations.*

It may be objected by ſome, as to the prohibitions of Uſury by the Law of God, that they were made only for the *Jews* among themſelves, but that they were at liberty to lend upon Uſury to Strangers[b]. And that Uſury is not expreſly prohibited by the Goſpel, in order to infer from thence that it is not unlawful by the Law of Nature: And it may be likewiſe imagined, with reſpect to that ancient Law among the *Romans*, that it was afterwards aboliſhed, and that Uſury was afterwards permitted at *Rome*, as appears both from the *Digeſt*, and the *Code*. And it will not be amiſs to give an anſwer to theſe laſt difficulties, for the ſatisfaction of thoſe who may not ſo readily perceive the anſwers to them, altho' they be eaſie to be underſtood.

[b] Thou ſhalt not lend upon uſury to thy brother; uſury of money, uſury of victuals, uſury of any thing that is lent upon uſury. Unto a ſtranger thou mayeſt lend upon uſury. *Deut.* xxiii. 19, 20.

Anſwer.

It is true, that the Law of God, which forbad Uſury to the *Jews*, allowed them to lend upon Uſury to Strangers. But we muſt not divide the Law againſt it ſelf: and this liberty cannot change the idea which God gives us of Uſury both in the Law it ſelf, and likewiſe by the Prophets. For ſeeing they tell us that Uſury is an Abomination; it is neceſſary that this Truth ſhould remain inviolable; and that this liberty granted to the *Jews* ſhould not be contrary to it. And in fact it is not contrary to it, as will appear from the remark we ſhall make on two Truths which we learn from the ſame Law, and from the Goſpel, and which plainly ſhew that this liberty which was given to the *Jews* to lend upon Uſury to Strangers, is no ways inconſiſtent with the Divine Prohibition of Uſury; and that this Prohibition is ſtill in greater force under the new Law.

The firſt of theſe Truths is, that the Law was given to a people choſen from among all other Nations[c]. And who, at the time that this Law was given them, did live in the midſt of other Nations, whom they were commanded to look upon as enemies whom they were to deſtroy without mercy[d], for fear leſt thoſe who compoſed the Elect People, ſhould ceaſe to look upon thoſe Strangers as enemies to God and them, and ſhould enter into ſuch ties and engagements with them, ſo as to be drawn over to their Idolatry, and their other Crimes[e].

[c] The Lord thy God hath choſen thee to be a ſpecial people unto himſelf, above all people that are upon the face of the earth. *Deut.* vii. 6.

[d] Thou ſhalt ſmite them, and utterly deſtroy them, thou ſhalt make no covenant with them, nor ſhew mercy unto them. *Deut.* vii. 2.

[e] Leſt they make thee ſin againſt me, if thou ſerve their Gods. *Exod.* xxiii. 33. Thou ſhalt not bow down to their Gods, nor ſerve them, nor do after their works, but thou ſhalt utterly overthrow them, and quite break down their images. *Exod.* xxiii. 24. *Deut.* vii. 4. For ſurely they will turn away your hearts after their Gods. 1 *Kings* xi. 2. *Exod.* xxxiv. 13.

The bare reflexion on this firſt Truth, is ſufficient to warrant our drawing this inference from it, that the liberty under the old Law of lending upon Uſury to Strangers, joined with the prohibition of Uſury among the *Jews* themſelves, proves nothing elſe but a Divine Diſpenſation to take Uſury from thoſe Nations whom they were to conſider as Enemies, and to exterminate from off the earth: and that this liberty was of the

ſame nature and character with the command that was given to the ſame people when they went out of *Egypt*, to borrow and carry away with them the moſt precious moveables of the *Egyptians*[l]. And as this commandment does not prove that it is lawful to ſteal, and does not hinder Theft from being a crime contrary to the Law of Nature; ſo the liberty of taking Uſury in the like circumſtances, does not prove that Uſury is not ſuch as God deſcribes it, both in his written Law, and by the Law which he has engraven on the mind of Man, and which the Heathens themſelves were not ignorant of.

[l] *Exod.* xi. 2. and xii. 35.

The other Truth which is to be obſerved, is, that the Divine Law was given to a ſtiff-necked and ignorant people[g], and who, becauſe of their ſtubbornneſs, were indulged by the ſame Law in ſome things which were prohibited enough by the Law of Nature. Thus, for example, that Written Law tolerated Divorce, and permitted it[h], although contrary to the Law of Nature, and to that ſtrict Union which God himſelf has formed between the Huſband and Wife, and of which it is ſaid, that it is not lawful for Man to put them aſunder[i]. And as the permiſſion of Divorce under the ancient Law would be a very falſe principle to juſtify it now adays; ſo likewiſe that which was given to the *Jews* to lend upon Uſury to Strangers, cannot be looked upon by us as a Rule ſince the publication of the Goſpel. For in the ſame manner as no body doubts now that Divorce is unlawful, and that it is a Truth and a Rule both of the Law of Nature, and the revealed Law of God, that Marriage is indiſſolvable; ſo likewiſe we can no more doubt, but that Uſury is a crime againſt the Law of Nature, and againſt the Law of God; and that the toleration of Uſury with regard to Strangers, is aboliſhed by the Goſpel, as well as the permiſſion of Divorce; ſeeing it is certain under the new Law, by which Truth is unveiled, and diveſted of the Types and Figures of the old Law[l], that there are now no people rejected or diſtinguiſhed in the ſight of God[m]; That the *Samaritan* is become neighbour to the *Jew*[n]; and that now there is no diſtinction of *Jew* and *Greek*, nor of other Stranger, ſeeing they are all of them called to the new Law, and are united to it under the obedience of their common Lord[o]. So that the liberty to lend upon Uſury to Strangers, cannot ſubſiſt for thoſe to whom no body is any more a Stranger, and who are commanded to look upon all Men, of what Nation ſoever without diſtinction, as their Brethren. And we may likewiſe add to theſe truths, that even before the Goſpel, the Prophets who prepared the minds of the people to receive the new Law, condemned Uſury, without diſtinguiſhing between Brothers and Strangers, as appears from the paſſages that have been quoted.

[g] A ſtiff-necked people. *Exod.* xxxii. 9. For thou art a ſtiff-necked people. *Deut.* ix. 6.

[h] *Deut.* xxiv. 1.

[i] *Moſes*, becauſe of the hardneſs of your hearts, ſuffered you to put away your wives: but from the beginning it was not ſo. *Matt.* xix. 8. Shall cleave unto his wife; and they two ſhall be one fleſh. What therefore God hath joined together, let no man put aſunder. *Matt.* xix. 5. *Gen.* ii. 23.

[l] All theſe things happened unto them for enſamples. 1 *Cor.* x. 11.

[m] But in every nation he that feareth him, and worketh righteouſneſs, is accepted with him. *Acts* x. 35. *Rom.* iii. 29. and xv. 10.

[n] Which of theſe three, thinkeſt thou, was neighbour unto him that fell among the thieves? *Luk.* x. 36.

[o] For there is no difference between the *Jew* and the *Greek*, for the ſame Lord is over all. *Rom.* x. 12. *Gal.* iii. 28. *Rom.* iii. 29. and xv. 10. *Acts* x. 28, 35.

Another objection, that the Goſpel has not forbidden Uſury.

As to the Goſpel, it is ſaid, that Uſury is not there prohibited, becauſe in one place where our Saviour Jeſus Chriſt hath ſpoken of Loan, he has not there in expreſs terms forbid the taking of Intereſt; but has only ſaid, that we muſt lend without hopes even of receiving back what we have lent[p]. The conſequence would be much better and more natural to conclude from the ſaid paſſage, that Jeſus Chriſt having commanded his diſciples to lend even with the danger of loſing, on ſuch occaſions where Charity does require it, in the ſame manner as he has commanded them to give Alms; it is natural to infer from thence, that it is much more his will and pleaſure, that they ſhould not take any more than what they have lent. And if it were true that he had permitted Uſury, what he has ſaid of himſelf would not be true, that he was come to give the Law its perfection, and its final accompliſhment, and not to aboliſh it[q]; ſeeing he would have aboliſhed the prohibition of Uſury, and permitted what the Law had prohibited as a very great crime, and one of thoſe that are moſt contrary to Charity.

Anſwer.

[p] Lend, hoping for nothing back. *Luke* iii. 6.

[q] Think not that I am come to deſtroy the Law, or the Prophets; I am not come to deſtroy, but to fulfil. *Matt.* v. 17.

If

If it be therefore true, that we dare not ſo much as have a thought that *Jeſus Chriſt* has ſaid any thing contrary to truth, we muſt acknowledge that this ſaying alone, that he is come to perfect the Law, implies the prohibition of Uſury as much as that prohibition is contained in all thoſe moſt holy and refined precepts which he has given us, in order to diſſuade us from ſetting our affections on earthly things. And we cannot be of opinion that he has permitted the great liberty of Uſury, without being guilty of an Impiety which comes very near to Blaſphemy. For it is nothing leſs than Blaſphemy againſt the Divine Sanctity of *Jeſus Chriſt*, to ſay, that he who is come to give the Law its Perfection, has been more indulgent in the matter of Uſury, than was even that Law which he came to perfect; and that that Divine Lawgiver, of whom it had been foretold, that he would deliver his People both from Uſury, and all other Iniquity [r], and that he was to wean Men from ſetting their affections on the Things of this World, ſhould countenance Covetouſneſs to that exceſs as to ſuffer a Commerce, which the old Law and the Prophets had condemned as a moſt heinous Crime, and which is ſo directly oppoſite to the Principles of his Goſpel.

[r] He ſhall redeem their ſoul from deceit and violence. *Pſal.* lxxii. 14.

Another Objection. Liberty of Uſury under the Roman *Law.*

Anſwer.

As to the liberty of taking Uſury granted by the *Roman* Law, that is an Authority which can no ways counterbalance that of the Law of God, nor that of the Councils, and the Ordinances of our Kings, which condemn Uſury, and puniſh it. But we may ſay moreover, that this liberty of Uſury mentioned in the Books of the *Roman* Law, is no other than a Relaxation of the Prohibitions that had been made of it, as has been already obſerved. So that what we ſee concerning Uſury in thoſe Books, is no more than a condeſcenſion to an Evil, which had got the better of all the Remedies uſed to prevent it, and an abuſe which paſt for a juſt title, and which went even to that exceſs, that we ſee in one of the Laws of the *Digeſt* [s], that it was a lawful Covenant to ſtipulate not only Intereſt from the time of the Loan to the time of Payment, but even to ſtipulate over and above a larger Intereſt, if the Debtor ſhould fail to pay at the time appointed.

[s] *L.* 12. *ff. de uſur.*

But we may ſay farther, that this Liberty of Uſury under the *Roman* Law was unjuſt, even according to the Principles of thoſe very Lawyers who did juſtify it. For we ſee in a Law that is taken from one of the moſt eminent among them, that the Gain made by Uſury is not natural. *Uſura non naturâ pervenit, ſed jure percipitur.* l. 62. ff. de rei vind. *Uſura pecuniæ, quam percipimus, in fructu non eſt: quia non ex ipſo corpore, ſed ex alia cauſa eſt, id eſt novâ obligatione.* l. 121. ff. de verb. ſignif. And what is added in the Law 62. *ff. de rei vind.* that Uſury which is not a Natural Profit, is exacted by vertue of a Right, does not ſignify that it was due by any Law; but that Right was a Stipulation which they thought ſufficient to juſtify their taking of Uſury, altho' they themſelves were of opinion that a bare Paction was not ſufficient for that purpoſe [t]. Which plainly ſhews, that they knew of no other title to warrant their taking of Uſury, beſides the Formality of a Stipulation. As if Uſury, which they knew to be naturally unlawful, and ſuch as could not even be demanded by vertue of any Paction, were become lawful by the bare pronunciation of the words which made the Stipulation.

[t] Quamvis uſuræ fœnebris pecuniæ, citra vinculum ſtipulationis peti non poſſint. *l.* 3. *Cod. de uſur. l.* 24. *ff. de præſcr. verb.*

Uſury unlawful without Exception.

All theſe proofs which ſhew that Uſury is not only unlawful, but that it is a Crime, do likewiſe ſufficiently evince, that there is no caſe wherein it is lawful; and that every Covenant, or Commerce, whereby Intereſt is taken for a Loan, whatever pretext is made uſe of to colour it, is a criminal Uſury, moſt piouſly condemned by the Law of God, and that of the Church, and moſt juſtly puniſhed by the Ordinances.

Theſe Prohibitions of Uſury in general, that is to ſay, of taking any Intereſt at all for a Loan, reach even to all ſorts of Uſurious Contracts, ſuch as Mortgages, or Pawns, where the Creditor is to receive out of the Revenue of the Thing mortgaged, or pawned, more than the Laws allow him to take for the Money lent, and other Contracts, where they colour Uſury under the appearance of a lawful Contract. We ſhall not explain under this Title the Rules of theſe ſorts of Contracts, and the Characters which may diſtinguiſh Uſurious Contracts, from thoſe which are not [u], becauſe our Rules touching

this matter are different from thoſe of the *Roman* Law, by which it was lawful to lend upon Uſury, and even to take inſtead of Intereſt, Lands to be enjoyed till the payment of the Debt, altho' the Revenue of the ſaid Lands might be of much greater value than the Intereſt of the Money lent [x].

[x] *See the firſt Section of the Title of Intereſt.*
[x] *L. 17. Cod. de uſur.*

Intereſt lawful after the term, and a Judicial Demand of it.

It is not neceſſary to acquaint the Reader, that under the Prohibitions of Uſury we are not to take in the caſes where the Borrower not paying at the time appointed, the Creditor demands payment of his Money Judicially, with Intereſt for the delay of Payment after the Demand. For then the Lender not being any longer obliged to grant a new delay, it is but juſt that he ſhould have Intereſt to indemnify him for the loſs he ſuſtains by the injuſtice of the Debtor, who fails to pay at the time appointed. But this Intereſt hath nothing in it like to that which the Creditor takes before the Demand, whether it be that the Debtor conſents to it voluntarily, or that the Creditor exacts it otherwiſe.

Contracts in relation to Annuities.

Neither is it neceſſary to obſerve here, that we are not to comprehend under Uſury the Contracts in relation to Annuities. For there is this eſſential difference between a Loan and an Annuity, that whereas in a Loan the Debtor may be compelled to pay the Principal Sum at the Term; he who owes an Annuity may keep the Principal as long as he pleaſes, paying the Annuity. And moreover, the Contract of an Annuity is a real Sale, which he who takes the Money on this ſcore makes; for he ſells in effect a certain Revenue out of his whole Eſtate, in conſideration of a Price.

Moderate Intereſt of Money allowed in Great Britain. *But Uſury prohibited.*

[*In* Great Britain, *we make a diſtinction between* Uſury *and* Legal Intereſt. *For whatever exceeds the Legal Intereſt is called* Uſury, *and he who exacts it is puniſhed as an* Uſurer. *But our Laws do allow a certain moderate Profit to be taken for the Uſe of Money. By* Stat. 12 Car. II. Chap. 13. *the Intereſt of Money is fixed at the Rate of ſix Pounds for the forbearance of One Hundred Pounds for a year. And whoever exacts more, forfeits the treble value of the Monies lent. By later Acts of Parliament the Legal Intereſt is reduced to Five* per Cent.]

SECT. I.

Of the Nature of the Loan of Things to be reſtored in Kind.

The CONTENTS.

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2. *The thing lent is alienated.*
3. *Definition of Creditor, and Debtor.*
4. *What Things may be lent in this manner.*
5. *Delivery neceſſary in the Loan, to form the Engagement.*
6. *Why all Obligations are converted into that of Loan.*
7. *The Obligation of a Loan cannot exceed the Thing lent.*
8. *Of the change of the Value of Money.*
9. *Of the change of the Value of Proviſions.*
10. *A Loan in appearance, which is a Sale.*
11. *A Thing given to be ſold, in order to lend the Price of it.*
12. *Money depoſited in order to be lent.*

I.

1. Definition of this kind of Loan.

THE Loan of Things to be reſtored in kind, is a Covenant by which one gives to another a certain quantity of thoſe kinds of Things that are given by Number, Weight, or Meaſure; ſuch as Money, Corn, Wine, and other things of the like nature, on condition that, ſince one ceaſes to have ſuch Things in his poſſeſſion whenever he uſes them, the Borrower ſhall reſtore, not the ſame Individual Thing he borrowed, but as much of the ſame Kind, and of the like Quality [a].

[a] Mutui datio in his rebus conſiſtit, quæ pondere, numero, menſurâ, conſtant. Veluti vino, oleo, frumento, pecuniâ numeratâ, ære, argento, auro, quas res aut numerando, aut metiendo, aut adpendendo in hoc damus, ut accipientium fiant. Et quoniam nobis non eædem res, ſed aliæ ejuſdem naturæ & qualitatis reddantur, inde etiam mutuum appellatum eſt, quia ita à me tibi datur, ut ex meo tuum fiat. *inſt. quib. mod. re contr. obl. l. 2. §. 1. & 2. ff. de reb. cred.* Quæ uſu tolluntur, vel minuuntur. *l. 1. ff. de uſufr. ear. rer. quæ uſ. conſ. vel. min.* Mutuum damus recepturi non eandem ſpeciem quam dedimus, (alioquin commodatum erit, aut depoſitum) ſed idem genus. *d. l. 2. ff. de reb. cred.*

II.

2. The thing lent is alienated.

In this kind of Loan, the Thing lent is alienated, and the Borrower becomes Proprietor of it; for otherwiſe he would have no right to conſume it [b].

[b] Inde mutuum appellatum eſt, quia ita à me tibi datur, ut ex meo tuum fiat. *inſt. quib. mod. re contr. obl.* See the firſt Article of the ſecond Section.

III. He

III.

3. Definition of Creditor, and Debtor.

He who lends ſuch Things as are conſumed by Uſe, is called Creditor, becauſe of the credit he gives to the promiſe of the perſon to whom he lends: and he who borrows is called Debtor, becauſe he is bound to reſtore the ſame Sum, or the ſame Quantity, which he has borrowed. But perſons may likewiſe become Debtor and Creditor for other cauſes, beſides that of Loan; becauſe there are other ways of being indebted, as well as by borrowing. Thus, in a Sale where the Price is payable at a certain term, the Seller is Creditor as to the Price, and the Buyer is Debtor of it. Thus, in Letting and Hiring, the Proprietor is Creditor of the Rent, or Hire, and the Tenant is Debtor of it[c].

[c] Creditorum appellatione non hi tantùm accipiuntur, qui pecuniam crediderunt; ſed omnes quibus ex qualibet cauſâ debetur. *l.* 11. *ff. de verb. ſign. l.* 10. *eod.* Credendi generalis appellatio eſt —— nam cuicumque rei aſſentiamur, alienam fidem ſecuti, mox recepturi quid ex contractu, credere dicimur. *l.* 1. *ff. de reb. cred.*

Creditum ergo à mutuo differt quâ genus à ſpecie, nam creditum conſiſtit extra eas res quæ pondere, numero, menſurâ continentur, *l.* 2. §. 3. *eod.*

IV.

4. What Things may be lent in this manner.

We may lend in this manner of Loan, all things that are of ſuch a nature that they may be repaid in Kind, in the ſame Quantity, and of the ſame Quality. Thus, beſides Money, Corn, Wine, and other Grain, and Liquors, we may likewiſe lend Gold, or Silver in Bullion, Copper, Iron, and other Metals, Silk, Wool, Leather, Sand, Lime, Plaiſter, and all other Things which may be repaid in kind, without difference of Quantity and Quality, in ſuch a manner as that which is reſtored to the Lender, may intirely ſupply the place of that which was lent[d]. Thus, on the contrary, we do not lend after this manner Beaſts and other Things, which altho' they be of the ſame Kind, yet every Individual of the Kind differs ſo much from another in Quality, that the Creditor cannot be compelled againſt his will to take in payment one Thing for another[e].

[d] Mutui datio in iis rebus conſiſtit, quæ pondere, numero, menſurâ conſtant. Veluti vino, oleo, frumento, pecuniâ numeratâ, ære, argento, auro *inſt. quib. mod. re contr. obl.* Quoniam nobis non eædem res, ſed aliæ ejuſdem naturæ, & qualitatis redduntur. *ibid.* Quoniam eorum datione poſſumus in creditum ire, quia in genere ſuo functionem recipiunt, ſed per ſolutionem. *l.* 2. §. 1. *ff. de reb. cred.*

[e] In cæteris rebus, ideo in creditum ire non poſſumus, quia aliud pro alio invito creditore ſolvi non poteſt. *d. l.* 2. §. 1. *in f. ff. de reb. cred.*

V.

5. Delivery necessary in the Loan, to form the Engagement.

In the Contract of Loan, the Borrower obliging himſelf to reſtore a Sum of Money, or a certain Quantity, equal to what he has borrowed; this Contract is of the number of thoſe where the Obligation is not formed, but by the Delivery of the Thing for which the Borrower obliges himſelf[f].

[f] Re contrahitur obligatio, veluti mutui datione. *inſt. quib. mod. re contr. obl.* See the ninth Article of the firſt Section of Covenants.

VI.

6. Why all Obligations are converted into that of Loan.

Since Money makes the Price of all Things that are vendible, and that it is often neceſſary to reduce into Money the Value of the Things which one owes to another; it is frequent and natural to convert into an Obligation of Loan, thoſe which proceed from other Cauſes that are quite different. Thus, for Example, when Perſons make up their Accounts of Sums of Money, or other Things, with which they ſupplied one another: when they agree their Differences by Tranſactions, and in other caſes of the like nature, if he who is found to be Debtor by the Balance of the Account, by the Tranſaction, or by other Cauſes, does not pay in ready Money that which he owes, he binds himſelf by an Obligation of Loan, becauſe what he owes is eſtimated in Money, and he becomes Debtor for it, in the ſame manner as if he had borrowed the Sum of Money that is Equivalent to the Thing which he was to have given[g].

[g] Æſtimatio rerum quæ mercis numero habentur, in pecunia numerata fieri poteſt. *l.* 42. *ff. de fidejuſſ. & mand.* Si in creditum abii, filio familias, vel ex cauſâ emptionis, vel ex alio contractu, in quo pecuniam non numeravi, & ſi ſtipulatus ſim, licèt cœperit eſſe mutua pecunia, &c. *l.* 3. §. 3. *ff. de Senat. Maced. l.* 5. §. 18. *ff. de tribut. act.*

VII.

7. The Obligation of a Loan cannot exceed the Thing lent.

The Creditor may ſtipulate with the Debtor for leſs than what he has lent, but not for more. For he may give, but not take too much. And if it ſhould appear that an Obligation were for a greater Sum than that which had been lent, it would be null as to the Overplus, that being without a cauſe[h].

[h] Si tibi dedero decem ſic ut novem debeas: Proculus ait, & rectè, non amplius te ipſo jure debere quàm novem: ſed ſi dedero ut undecim debeas, putat Proculus, amplius quàm decem condici non poſſe. *l.* 11. §. 1. *ff. de reb. cred.* See the fifth Article of the firſt Section of Covenants.

VIII. In